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No. ____

IN THE
# Supreme Court of the United States

BALTIMORE CITY DEPARTMENT OF SOCIAL SERVICES,
*Petitioner,*

v.

TERESA B.,
*Respondent.*

On Petition For A Writ Of Certiorari
To The Court Of Appeals Of Maryland

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

The Court of Appeals of Maryland held that although the parent of an abused or neglected child who was missing from his foster care placement could be ordered to produce the child to the juvenile court having protective jurisdiction over the child, the Fifth Amendment privilege against self-incrimination foreclosed the juvenile court from compelling the parent to disclose the child's last known location. This case presents the following question:

Does the Fifth Amendment privilege against self-incrimination permit the parent of a missing child who has been abused or neglected to defy an order issued by a juvenile court having protective jurisdiction over the child pursuant to the State's regulatory regime for the protection of such children by refusing to disclose the child's last known location?

## PARTIES TO THE PROCEEDING

The parties to the proceeding below were the Baltimore City Department of Social Services (appellee in the Court of Special Appeals of Maryland and petitioner in the Court of Appeals of Maryland) and Teresa B. (appellant in the Court of Special Appeals of Maryland and respondent in the Court of Appeals of Maryland). Teresa B. is the mother of Ariel G., a child who was at times relevant to the proceeding under the protection of the juvenile court and the Baltimore City Department of Social Services. Although Ariel G. was nominally an appellee in the Court of Special Appeals of Maryland and a respondent in the Court of Appeals of Maryland, neither Ariel G. nor his counsel participated in the proceedings in the appellate courts.

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On Petition For A Writ Of Certiorari
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## PETITION FOR A WRIT OF CERTIORARI

The Baltimore City Department of Social Services ("BCDSS"), an agency of the State of Maryland ("the State"), respectfully petitions this Court for a writ of certiorari to review the judgment of the Court of Appeals of Maryland.

## OPINIONS BELOW

The issues raised in this petition have been decided by the Court of Appeals of Maryland, the Court of Special Appeals of Maryland, and the Circuit Court for Baltimore City (Division for Juvenile Causes). The October 5, 2004 opinion of the Court of Appeals of Maryland, captioned *In re Ariel G.*, is reported at 383 Md. 240, 858 A.2d 1007 (2004), and is reproduced in the Appendix to this petition

("App.") at pages 1a-18a. The December 10, 2003 opinion of the Court of Special Appeals of Maryland is reported at 153 Md. App. 698, 837 A.2d 1044 (2003), and is reproduced at App. 20a-40a. The unreported order of the circuit court is reproduced at App. 42a-43a.

## JURISDICTION

The final judgment of the Court of Appeals of Maryland was entered on October 5, 2004. Upon a timely consent application for extension of time pursuant to Sup. Ct. R. 13.5, this Court extended the time for filing a petition for writ of certiorari until February 2, 2005. This petition was filed on February 2, 2005. Therefore, this Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth Amendment to the Constitution of the United States:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in a time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Also pertinent to this case are the provisions of Maryland's Children in Need of Assistance statute, Md.

Code Ann., Courts and Judicial Proceedings ("Cts. & Jud. Proc.") §§ 3-801 to 3-830 (2002 Repl. Vol., 2004 Supp.), the text of which is reproduced at App. 44a-86a.

## STATEMENT OF THE CASE

Ariel G. was born on January 28, 1991. On September 17, 1996, a local hospital notified BCDSS that Ariel, then five years old, was believed to be suffering from medical neglect due to the refusal of his mother, Teresa B., to provide him with appropriate medical treatment for his severe asthma. (App. 2a.) BCDSS took Ariel into its protective custody and immediately instituted child in need of assistance proceedings in the Circuit Court for Baltimore City, serving in its capacity as the "juvenile court" pursuant to Md. Code Ann., Cts. & Jud. Proc. §§ 3-802(I) and 3-803(a)(2). (App. 1a-2a, 45a, 49a.)

In Maryland, a child in need of assistance (sometimes referred to as a "CINA," *see* Md. Code Ann., Cts. & Jud. Proc. § 3-801(g)), is a child who "requires court intervention" because the child "has been abused, has been neglected, has a developmental disability, or has a mental disorder; and the child's parents, guardian, or custodian are unable or unwilling to give proper care and attention to the child's needs." Md. Code Ann., Cts. & Jud. Proc. § 3-801(f). (App. 44a-45a.) "Neglect," as used in the statute, includes the "failure to give proper care and attention to a child by any parent or individual who has temporary care or custody or responsibility for supervision of the child under circumstances that indicate . . . the child's health or welfare is harmed or placed at significant risk of harm...." Md. Code Ann., Cts. & Jud. Proc. § 3-801(s). (App. 47a.)

Upon BCDSS' filing of a CINA petition in this case, the juvenile court held an emergency shelter care hearing and ordered that Ariel remain in the custody of BCDSS

pending an adjudicatory hearing. (App. 2a.) In the CINA context, emergency shelter care means "a temporary placement of a child outside of the home" prior to an adjudicatory hearing in order "to protect the child from serious immediate danger" when "there is no parent, guardian, custodian, or other person able to provide supervision." Md. Code Ann., Cts. & Jud. Proc. §§ 3-801(w); 3-815(b). (App. 48a, 62a-63a.) Placement in emergency shelter care requires that a "shelter care hearing" must be held by the next day court is in session to determine whether the placement is warranted. Md. Code Ann., Cts. & Jud. Proc. §§ 3-801(x); 3-815(c)(2)(ii). (App. 48a, 63a.) An "adjudicatory hearing" is the first of two hearings the juvenile court must conduct to resolve a CINA petition. At an adjudicatory hearing, the juvenile court determines whether the allegations in the petition are true. Md. Code Ann., § 3-801(c). (App. 44a.) At a "disposition hearing," the juvenile court determines "whether a child is in need of assistance" and, if so, "the nature of the court's intervention to protect the child's health, safety, and well-being." *Id.*, § 3-801(m). (App. 46a.)

Before an adjudicatory hearing could be held, Teresa B. absconded with Ariel. (App. 2a.) She eluded the authorities and kept Ariel hidden for three and a half years. (App. 2a.) Teresa was apprehended on March 27, 2000, but Ariel was not with her, and she refused to disclose where he was. (App. 2a.) On March 29, 2000, Ariel was found and again placed in the custody of BCDSS pursuant to a court order for emergency shelter care. (App. 2a.) Also on March 29, 2000, Teresa was found to be in direct contempt of the court for obstructing the juvenile court proceedings by preventing the court from exercising its jurisdiction over Ariel during the three and a half years he was missing. (App. 2a.) The court imposed a sentence of

179 days imprisonment for the contempt with all of the sentence suspended, subject to conditions of probation requiring, *inter alia*, that she refrain from disrupting Ariel's foster care placement. (App. 2a, 3a n.3.) On May 30, 2000, Teresa was convicted and jailed for violating the terms of her probation by having an altercation with a supervisor at the foster care facility where Ariel was placed.[1] (App. 2a-3a, 3a n.3.)

In September of 2000, the juvenile court determined Ariel to be a CINA and committed him to the custody of BCDSS, which placed him in a foster home. (App. 2a.) After Teresa was released from incarceration, Ariel's foster parents reported on January 9, 2001, that he had been missing since sometime during the previous night. (App. 2a.) During the next several months, attempts to locate Ariel and Teresa were unsuccessful. (App. 2a, 20a.)

Teresa was apprehended in the summer of 2001 and placed in the women's detention center pending a bail hearing on constructive criminal contempt charges arising from her prior violation of the terms of her probation. (App. 3a, 21a.) On August 3, 2001, the juvenile court convened a hearing in Ariel's CINA case. (App. 3a.) When the juvenile court questioned Teresa concerning Ariel's location, she refused to answer, citing the Fifth Amendment privilege against self-incrimination. (App. 3a.) Rejecting Teresa's Fifth Amendment claim, the

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[1]The March 29, 2000 and May 30, 2000 judgments were reversed and vacated by the Court of Special Appeals of Maryland in an unreported opinion issued on January 19, 2001. (App. 2a n.1, 3a n.3.) Thereafter, Teresa B. was charged with constructive criminal contempt. (App. 2a-3a.)

juvenile court found her to be in direct contempt and ordered her incarcerated until she purged the contempt. (App. 3a.) Over the next several months, Teresa was brought before the juvenile court to provide her with an opportunity to purge the contempt, but each time, she refused to answer questions concerning Ariel's location. (App. 3a.)

At a hearing on June 5, 2002, Teresa maintained that she could not possibly know the present location of the child because she had been incarcerated for the previous ten months. (App. 3a, 88a.) The court then rephrased its question as, "where were you when you last saw [Ariel] ten months ago?" (App. 88a.) Again, Teresa invoked the Fifth Amendment, was held in contempt, and was returned to the detention center. (App. 87a.) Teresa noted a timely appeal from the June 5, 2002 order. (App. 4a, 4a n.5, 28a.)

At a subsequent juvenile court hearing on September 26, 2002, Teresa again refused to disclose any information about Ariel's location. Despite Teresa's refusal to assist the juvenile court's efforts to find Ariel, shortly thereafter Ariel was found by BCDSS through other means and placed in foster care. (App. 4a.) Although Teresa was then released from incarceration, under Maryland law, her release did not render her appeal moot, as each of the appellate courts concluded below. (App. 4a n.5, 26a.)

On December 10, 2003, the Court of Special Appeals of Maryland issued a reported opinion reversing the June 5, 2002 judgment of contempt. (App. 20a-41a.) Thereafter, the Court of Appeals of Maryland granted BCDSS' petition for a writ of certiorari to review the decision of the Court of Special Appeals. (App. 19a.) After briefing and oral argument, the Court of Appeals issued a reported opinion on October 5, 2004, affirming

the decision of the Court of Special Appeals. (App. 1a-18a.)

In its opinion, the Court of Appeals acknowledged that this Court's decision in *Baltimore City Dept. of Social Services v. Bouknight*, 493 U.S. 549 (1990) (holding that the parent of an abused or neglected child could not invoke the Fifth Amendment privilege to resist a juvenile court order to produce her missing child), "may appear similar factually," but nonetheless concluded that "its reasoning is not applicable to the present case." (App. 10a.) Although *Bouknight* held the Fifth Amendment privilege to be unavailing "even when criminal conduct" by the parent "may exist," *id.*, 493 U.S. at 561, and even though the compelled act of producing a missing child may impart testimony that "may prove incriminating," *id.*, 493 U.S. at 555, the Court of Appeals sought to distinguish *Bouknight* by characterizing it as a decision that did not involve testimony at all. In the lower court's opinion, the act of producing the child in *Bouknight* "was not a testimonial communication" (App. 11a), but Teresa B.'s "failure to *testify* regarding her knowledge of [Ariel G.'s] whereabouts" (App. 10a) involved "a purely testimonial communication" (App. 11a). (Emphasis in original.)

Whereas *Bouknight* concluded that the parent could not invoke the privilege to resist the juvenile court's order because "she [had] assumed custodial duties" as to her missing child and because the act compelled by the order was "required as part of a noncriminal regulatory regime," *id.*, 493 U.S. at 555-56, the Court of Appeals conflated those two circumstances. In *Bouknight* this Court recognized that under Maryland law the "care and safety" of the child "became the particular object of the State's regulatory interests," not when the mother "assumed custodial duties" by agreement with BCDSS, but prior to

that when the child "was adjudicated a child in need of assistance." *Id.*, 493 U.S. at 559. However, the Court of Appeals construed *Bouknight* to mean that "the regulatory regime of the BCDSS" was implicated, and the "ability to invoke the Fifth Amendment was reduced," only "[b]ecause Bouknight explicitly had consented to the conditions placed upon her by BCDSS. . . ." (App. 12a.)

Though the Court of Appeals quoted *Bouknight*'s reaffirmation of the principle that "the ability to invoke the [Fifth Amendment] privilege may be greatly diminished when invocation would interfere with the effective operation of a generally applicable civil regulatory requirement," such as Maryland's Child in Need of Assistance provisions (App. 13a) (quoting *Bouknight*, 493 U.S. at 557), the opinion below adopted a categorical rule that would effectively prevent the application of this Court's principle. As the Court of Appeals held in this case, whenever "the operation of a regulatory regime demands testimony that may be incriminating, the Fifth Amendment may be invoked." (App. 15a.) Thus, in the lower court's view, any time the basic elements of the privilege are present, the ability to invoke the Fifth Amendment is not diminished, and the State's interest in the effective operation of its civil regulatory regime must yield.

In announcing this rule, the Court of Appeals acknowledged that when "a child is taken properly into State custody to prevent further abuse, it is imperative that the State do all within its power to ensure that the child is provided with a safe and healthy environment." (App. 15a-16a.) The lower court further recognized that "[b]y fleeing with Ariel, if she did, Teresa denied the State the opportunity to provide the child with proper medical treatment, and in turn she, at the least, may have denied

Ariel his right to be healthy and to receive a proper education." (App. 16a.) Nevertheless, the Court of Appeals concluded that the best interests of the child and the State's noncriminal regulatory regime for protecting abused or neglected children must yield to the Fifth Amendment privilege asserted by an abusive or neglectful parent. In the lower court's view, what matters is not "what is at stake for the courts or society at large," but solely "what is at stake for" the parent, who is a "potential defendant." (App. 16a.)

The Court of Appeals allowed that the State could require a parent to disclose the location of a lost child only if use immunity from criminal prosecution were first offered to the parent and a grant of immunity sought from the criminal court by prosecutors (App. 17a-18a), who are constitutional officers, *see* Md. Const., Art. V, §§ 7 to 11, and, therefore, independent from the executive branch, of which BCDSS is part, *see* Md. Code Ann., Art. 88A, §§ 3(a)(2) and 13(a) (local social services departments are agencies within State Department of Human Resources). The court did not consider that the ability to grant such immunity from criminal prosecution is beyond the authority of the juvenile court or BCDSS. *See* Md. Code Ann., Cts. & Jud. Proc. § 9-123 (authorizing grant of immunity only by court in criminal prosecution or grand jury proceeding).

The Court of Appeals' opinion also did not acknowledge applicable federal and state statutes that require the proceedings and record of a CINA case to be kept confidential and effectively render testimony in the juvenile court unavailable for use in a criminal prosecution. *See* Child Abuse Prevention and Treatment and Adoption Reform Act, 42 U.S.C. §5106a(b)(2)(A)(viii); Md. Code Ann., Cts. & Jud. Proc.

§ 3-827 (App. 83a-84a); Md. Code Ann., Art. 88A, § 6 (2003 Repl. Vol.). *See also* Md. Code Ann. Cts. & Jud. Proc. Code Ann. § 3-810(b)(1) (juvenile court may exclude the public from CINA proceedings and admit "only those persons having a direct interest in the proceedings and their representatives"). (App. 57a.)

## REASONS FOR GRANTING THE WRIT

This case presents an important issue of federal constitutional law potentially affecting the health and safety of many thousands of abused and neglected children in this country, a question this Court left unanswered fifteen years ago in the similar case of *Baltimore City Department of Social Services v. Bouknight*, 493 U.S. 549 (1990).

*Bouknight* held that the Fifth Amendment privilege against self-incrimination could not be invoked to resist a juvenile court order compelling the parent of an abused or neglected child to produce her missing child so that the court could protect the child from further harm in accordance with the State's regulatory provisions for endangered children. *Id.*, 493 U.S. at 551. The *Bouknight* decision did not address whether the Fifth Amendment could be interposed against the alternative requirement of the juvenile court's order there, which would have permitted the parent to purge the contempt by revealing where the child could be found. *See id.* at 553. This Court should grant review in this case to recognize, as the corollary of *Bouknight*'s holding, that when an abused or neglected child under the protective jurisdiction of the juvenile court is missing, the Fifth Amendment privilege does not permit the child's parent to defy the juvenile court's order to disclose the child's last known location.

Here, Maryland's highest court has held, much as it did previously in *Bouknight*, that a parent who has abused or neglected her child is free to use the Fifth Amendment privilege to obstruct the juvenile court's efforts to locate the child, whose very life may be in jeopardy. The Maryland Court of Appeals reached this conclusion by misconstruing both the letter and the spirit of this Court's decision in *Bouknight*, which held that "the Fifth Amendment privilege may not be invoked to resist compliance with" Maryland's "regulatory regime" for the protection of children in need of assistance, which has been "constructed to effect the State's public purposes unrelated to the enforcement of its criminal laws." *Bouknight*, 493 U.S. at 556.

Unless this Court grants review and reverses the unsound rule of federal constitutional law announced by the Maryland Court of Appeals, the State will be hindered in its ability to find and care for abused or neglected children who have disappeared from foster care, and the lives of already endangered children will be placed at even greater risk. Though the State ultimately was able to locate the missing child in this case and the parent was released from incarceration, this matter continues to present a live case or controversy because the decision below inflicts a significant "ongoing injury," *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289 (2000)(citing *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 617-18 (1989)), by preventing the State, in all pending and future cases, from compelling parents' cooperation in the search for their missing children who are under the juvenile court's protective jurisdiction.

Moreover, absent a writ of certiorari in this case, the State is likely to be precluded from seeking future relief from this ongoing limitation upon its ability to protect children. Under the rule adopted by Maryland's highest

court, juvenile courts will be constrained from issuing contempt orders whenever a parent refuses to disclose the last known location of a missing child. Because a court's decision not to issue a contempt order cannot be appealed under Maryland law, *see Pack Shack, Inc. v. Howard County*, 371 Md. 243, 808 A.2d 795 (2002), this case is likely to be the State's only opportunity to seek redress in this Court, or any other court. Therefore, this Court should grant review and seize the opportunity to address this question of utmost public importance.

## I. THE MARYLAND COURT OF APPEALS' DECISION IS CONTRARY TO THIS COURT'S PRECEDENTS PREVENTING THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION FROM INTERFERING WITH CIVIL REGULATORY REQUIREMENTS FOR THE PROTECTION OF CHILDREN.

The decision of the Court of Appeals departs from this Court's precedents not only in its misreading of *Bouknight* but in its fundamental misconception of how this Court has resolved constitutional questions bearing upon the interests of children.

Most significantly, this Court's jurisprudence contradicts the Court of Appeals' categorical rule that the State's interest in protecting children must always yield whenever a parent arguably satisfies the three general criteria for asserting the Fifth Amendment privilege against self-incrimination, *i.e.*, that the information sought to be elicited must be "compelled, testimonial, and self-incriminating." (App. 5a; *see* App. 15a.) On the contrary, in *Bouknight* this Court assumed without deciding that the compelled production of the missing child was both

"sufficiently testimonial" and "sufficiently incriminating" to satisfy all three criteria for the privilege, *id.*, 493 U.S. at 555 (citation omitted), and yet the Court held that the parent's privilege against self-incrimination could not overcome the State's interest in finding and protecting an abused or neglected child, as enforced by the juvenile court's contempt order, *id.* at 555-56.

Unlike the Court of Appeals' rule, which would protect only the parent at the expense of her child, *Bouknight* reaffirmed this Court's insistence that constitutional rights of parents and other adults must accommodate the rights of children and the State's "compelling" interest in "safeguarding the physical and psychological well-being of a minor." *Maryland v. Craig*, 497 U.S. 836, 853 (1990) (holding "physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his accusers in court")(citation omitted). *See Globe Newspaper Co. v. Superior Court of Norfolk County*, 457 U.S. 596, 608-09 (1982) (State's interest in physical and psychological well-being of child victim may warrant closing criminal trial to press and public). Accordingly, this Court has "sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutional rights." *New York v. Ferber*, 458 U.S. 747, 757 (1982) (rejecting First Amendment challenge to conviction for child pornography). In particular, this Court has deferred to the States' "wide range of power for limiting parental freedom and authority in things affecting the child's welfare." *Prince v. Massachusetts*, 321 U.S. 158, 167 (1944) (State's interest in child safety prevailed over parent's First Amendment challenge to statute prohibiting children from distributing

literature in public thoroughfare). Because the Court of Appeals below lost sight of these considerations, its decision warrants further review and reversal.

The Court of Appeals also manifestly misconstrued the meaning of *Bouknight* when it characterized the compelled act of producing the child there as "not a testimonial communication," and, therefore, "outside the Fifth Amendment's protection." (App. 11a.) Contrary to the lower court's suggestion, *Bouknight* expressly declined to reach either of those conclusions. Instead, this Court assumed without deciding that the juvenile court's order did call for the mother's testimonial and incriminating statement within the meaning of the Fifth Amendment privilege, in that it testified "to the existence, possession, or authenticity" of the child produced; it might convey "her implicit communication of control over" the child "at the moment of production;" and it could "aid the State in prosecuting" the mother. *Bouknight*, 493 U.S. at 555. *See also id.* at 563 (Marshall, J., dissenting) ("Although the Court assumes that respondent's act of producing her child would be testimonial and could be incriminating, [*id.* at 555], it nonetheless concludes that she cannot invoke her privilege against self-incrimination and refuse to reveal her son's current location.").

However, even assuming, as the Court of Appeals did, that *Bouknight* rested upon the non-testimonial nature of producing the child, that assumption in itself does not warrant the conclusion drawn by the Court of Appeals. It must be acknowledged that an answer to the juvenile court's question to Teresa B. below, seeking the location of her missing child when she last saw him ten months previously, would have communicated even less information of "testimonial or communicative" value than

the act of producing the child conveyed in *Bouknight*.[2] Thus, the Court of Appeals' analysis makes little sense when the circumstances of this case are compared to what this Court actually decided in *Bouknight*.

Similarly, the Court of Appeals' opinion erroneously limits this Court's holding in *Bouknight* by conditioning the State's ability to enforce its "generally applicable, civil regulatory requirement," *id.*, 493 U.S. at 557, upon the prior agreement of the abusive or neglectful parent "to subject herself voluntarily to the regulatory scheme." (App. 15a.) As the court below interpreted *Bouknight*, the State's interest in finding and protecting a missing child who has been abused or neglected could prevail over the parent's assertion of privilege only if the parent had previously entered an agreement with the juvenile court and the State agency to assume custody of her child. (App. 12a, 15a.) On the contrary, *Bouknight* recognized, as Maryland law provides, that the "care and safety" of the child in *Bouknight* "became the particular object of the State's regulatory interests" when the child "was adjudicated a child in need of assistance," *id.*, 493 U.S. at 559, an event that preceded and was in no way dependent upon the mother's agreement to assume custody. *See* Md. Code Ann., Cts. & Jud. Proc. § 3-801(u)(1)(ii) (providing for parent to be a party in a CINA proceeding under juvenile court jurisdiction with no requirement that parent enter agreement). (App. 47a.)

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[2]Unlike a parent's act of producing a child, a statement of the child's location at some time in the past would not amount to "testimony regarding [a parent's] control over, and possession of" the child. *Bouknight*, 493 U.S. at 555.

Finally, the Court of Appeals' decision mistakes the meaning of *Bouknight*'s discussion of possible limitations on the use of testimony compelled by a juvenile court in any subsequent criminal proceedings. *See Bouknight*, 493 U.S. 561-62. This Court's analysis contemplated that the parent who has been compelled to aid the juvenile court in recovering a missing child may later raise the Fifth Amendment privilege if she "subsequently faces prosecution" and may thereby prevent "testimonial aspects" from being used by the prosecution. *Id.* The Court of Appeals distorted this Court's analysis of what might ensue in a criminal prosecution *after* a compelled disclosure in juvenile court into an unprecedented requirement that the State must grant the parent use immunity from prosecution *before* it may seek to compel disclosure of a missing child's location in a juvenile court proceeding. (App. 17a-18a.)

While this Court's precedents impose no such requirement, decisions of this Court do suggest that the Court of Appeals' insistence on a grant of use immunity as a precondition may pose difficulties for prosecutors that could place a significant obstacle in the path of a juvenile court and further delay efforts to locate a missing child. [3]

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[3]Prosecutors may be resistant to offering use immunity for valid reasons. This Court has noted the "significant drawback" use immunity entails for prosecutors, and the "heavy burden" it imposes upon them to prove that "all of the evidence" presented at a criminal trial "was derived from legitimate independent sources," an evidentiary standard that "may result in the preclusion of crucial evidence that was obtained legitimately." *Braswell v. United States*, 487 U.S. 99, 117 (1988).

Such an obstacle exists as a matter of law in Maryland, where the statute authorizing use immunity for compelled testimony applies only "in a criminal prosecution or a proceeding before a grand jury," Md. Code Ann., Cts. & Jud. Proc. § 9-123(b), and Maryland law recognizes no authority on the part of juvenile courts or the State's social services agencies, such as BCDSS, to grant immunity from criminal prosecution.

In any case, the Court of Appeals' imposition of a use immunity requirement is unwarranted in light of pertinent federal and Maryland law designed to ensure confidentiality of juvenile court proceedings and records concerning child abuse or neglect. *See* 42 U.S.C. § 5106a(b)(2)(A)(viii) (State must "preserve the confidentiality of all records in order to protect the rights of the child and of the child's parents" to be eligible for federal funding under Child Abuse Prevention and Treatment and Adoption Reform Act); Md. Code Ann., Cts. & Jud. Proc. § 3-827(a)(1) ("All court records under this subtitle pertaining to a child shall be confidential and their contents may not be divulged, by subpoena or otherwise, except by order of the court on good cause shown.") (App. 83a); Md. Code Ann., Art. 88A, §§ 6(b), 6(e) (2003 Repl. Vol.) (unauthorized disclosure of child abuse or neglect records or reports is a criminal offense). *See also* Md. Code Ann. Cts. & Jud. Proc. Code Ann. § 3-810(b). (App. 57a.) Under Maryland Rules, "[f]iles and records of the court in juvenile proceedings, including the docket entries and indices, are confidential and shall not be open to inspection except by order of the court or as otherwise expressly provided by law." Md. Rule 11-

121(a).[4] *See* Md. Rule 8-121 (providing for confidentiality of juvenile court matters in appellate proceedings). These provisions of law make it unlikely that any disclosure compelled by the juvenile court could be used as evidence in a criminal proceeding.

For these reasons, the holding below, that the Fifth Amendment privilege precludes the juvenile court from compelling a parent to reveal the last known location of her missing child, conflicts with applicable decisions of this Court. *See* Sup. Ct. R. 10(c). This Court should grant review and reverse that decision.

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[4]Maryland Rule 11-121(a) makes cross-reference to a statute, § 3-812 of the Courts Article, which has been repealed. Although Rule 11-121(a) suggests that under the former § 3-812 some hearings could be open to the public, § 3-812 did not apply to hearings in Child in Need of Assistance cases, such as the one involving Ariel G. here.

## II. THIS FUNDAMENTAL FIFTH AMENDMENT ISSUE AFFECTING ABUSED OR NEGLECTED CHILDREN THROUGHOUT THE NATION IS A MATTER OF GREAT PUBLIC CONCERN.

The Fifth Amendment issue presented here, which "has not been, but should be, settled by this Court," Sup. Ct. R. 10(c), potentially affects every one of the more than 800,000 abused and neglected children who each year[5], in accordance with provisions of the federal Adoption and Safe Families Act ("ASFA"), Pub. L. No. 105-89 (1997), come under the protective supervision of State juvenile courts across this country.[6] While juvenile court judges throughout the nation are charged with overseeing the safety and well-being of these children, each child potentially could run away or be abducted from care. In fact, nationwide, approximately two percent of all foster

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[5]U.S. Dept. of Health and Human Services, Admin. for Children & Families, Children's Bureau, *National Adoption and Foster Care Statistics*, text at www.acf.dhhs.gov/programs/cb/dis/afcars.htm (website last visited Jan. 31, 2005). On average, approximately 532,000 foster children are in state protective custody at any given time. *Id.*

[6]U.S. Dept. of Health and Human Services, Admin. for Children and Families, Youth and Families, Children's Bureau, *Adoption and Foster Care Analysis and Reporting System (AFCARS) Report*, Mar. 2003, text at www.acf.dhhs.gov/programs/cb/publications/afcars/report9.pdf (website last visited Jan. 31, 2005) (hereinafter "*AFCARS Report*").

children are reported as missing at any one time.[7] Often, as in this case, it is not known whether a foster child has run away or has been abducted.[8]

Not surprisingly, missing foster children are at extreme risk.[9] Juvenile court judges cannot provide for the safety and well-being of foster children when those children are missing from their foster placements. The ability to ask a parent where he or she last saw a child is an essential tool for finding and protecting the child, whether the child has run away or is the victim of an abduction.

When foster children run away, they often run to family and friends.[10] When they do so, they may experience further abuse or neglect at the hands of the very persons from whom they have been removed by the juvenile court for their own protection.[11] Tragically, a number are killed by their abductors, and those homicides

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[7] *AFCARS Report, supra.*

[8] *AFCARS Report, supra.*

[9] Caren Kaplan, *Children Missing from Care,* Child Welfare League of America, CWLA Press (2004), text at www.cwla.org/programs/fostercare/childmiss.htm (website last visited Jan. 31, 2005) (hereinafter "*Children Missing*").

[10] Marni Finkelstein, *et al., Youth Who Are Chronically AWOL From Foster Care*, Vera Inst. of Justice, at 13-17 (Aug. 2004), text at www.vera.org (website last visited Jan. 31, 2005) (hereinafter "*AWOL Youth*").

[11] *Children Missing, supra.*

may involve abusive parents.[12] Runaways often are subjected to hunger, homelessness, crime, prostitution, exploitation or molestation.[13] Thus, when a child has disappeared from court-ordered care, the threat to the child's health and safety must be considered real and immediate, and the juvenile court's need for information leading to the recovery of the child is unquestionably urgent.

The safe return of these missing foster children is of paramount concern to the juvenile courts of this country. Charged as they are to safeguard children in their care, juvenile court judges must have the ability to insist that a parent answer the question: where did you last see your missing child?

## III. THE STATE COURTS THAT HAVE CONSIDERED THE ISSUE ARE IN CONFLICT.

The sobering statistics serve as a reminder that the primary interest of juvenile courts lies in finding and caring for the thousands of foster children who are missing at any given moment, rather than in pursuing sanctions against recalcitrant parents. This overriding concern for the best interests of children, coupled with the effect of court doctrines limiting the ability to appeal contempt orders, may explain the dearth of reported appellate

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[12]Troy Anderson, *500 Foster Kids Missing,* Los Angeles Daily News (Oct. 1, 2002), text at www.dailynews.com/cda/article/print/0,1674,200%7E20954%7E86518,00.htm (website last visited Jan. 31, 2005).

[13]*Children Missing*, at 20-25; *AWOL Youth*, at 13-17.

decisions raising the issue presented in this case. Even so, the highest courts of two States, Maryland and Massachusetts, have now addressed the question whether a juvenile court may compel a parent to reveal the location of a missing child in need of assistance, and the courts have reached diametrically different conclusions.

Unlike the decision below, the Supreme Judicial Court of Massachusetts rejected two parents' Fifth Amendment challenge to contempt orders issued by a juvenile court compelling them to disclose the location of their child in need of assistance. *See In the Matter of a Care and Protection Summons*, 770 N.E.2d 456 (2002)(Marshall, C.J.). In that case, the juvenile court ordered a newborn infant placed in protective custody. *Id.*, 770 N.E.2d at 460. The parents refused to bring the infant to juvenile court and asserted the privilege against self-incrimination. *Id.*, 770 N.E.2d at 459. As in this case, the juvenile court held them in contempt, ordered them to be incarcerated, and gave them multiple opportunities to purge the contempt by disclosing the location of the infant. *Id.*, 770 N.E.2d at 459, 461, 462 n.13. *See, e.g., id.*, 770 N.E.2d at 461 n.10 (ordering the parents either to present the child or to provide "direct information as to where that child is regardless of the condition of that child be it dead or alive"); *id.*, 770 N.E.2d at 462 (giving parents the alternative of purging the contempt "by identifying the location of the alleged burial site").

The parents persisted in their refusal to disclose the location of the child and continued to assert the Fifth Amendment privilege against self-incrimination. Despite these circumstances, which would suffice under the Maryland Court of Appeals' rule to warrant invocation of the privilege in defiance of a juvenile court's inquiry, the Massachusetts high court rejected the parents' Fifth

Amendment objection and affirmed the contempt orders.[14] *Id.*, 770 N.E.2d at 467-68, 469.

Thus, certiorari is further warranted because in this case Maryland's court of last resort "has decided an important federal question in a way that conflicts with the decision of another state court of last resort . . . ." Sup. Ct. R. 10(b). This Court should grant review to resolve this conflict and provide guidance to all State courts.

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[14]In response to the parents' main Fifth Amendment argument as to one alternative offered by the juvenile court as a purge provision, the Massachusetts high court concluded that the information sought was not deemed "compelled" because the juvenile court directed the parents to disclose the location of the remains to verify their own assertion that the child died in a miscarriage. *Care and Protection Summons*, 770 N.E.2d at 467, 468 (citing *United States v. Rylander*, 460 U.S. 752, 758-59 (1983); *United States v. Butler*, 211 F.3d 826, 832 (4th Cir. 2000), *cert. denied*, 531 U.S. 1149 (2001)). However, the Massachusetts decision both affirms and characterizes favorably other orders of the juvenile court compelling disclosure of the child's location before the parents had made any such claim or testified at all. *See Care and Protective Summons*, 770 N.E.2d at 467, 467 n.24. The court concluded that the parents' Fifth Amendment challenges to both sets of juvenile court orders were "equally unavailing." *Id.*, 770 N.E.2d at 467.

## CONCLUSION

For the reasons stated, this Court should issue a writ of certiorari to review the judgment of the Court of Appeals of Maryland. Following review, the judgment should be reversed.

Respectfully submitted,

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No. _____

IN THE
# Supreme Court of the United States

BALTIMORE CITY DEPARTMENT OF SOCIAL SERVICES,
*Petitioner,*

v.

TERESA B.,
*Respondent.*

On Petition For A Writ Of Certiorari
To The Court Of Appeals Of Maryland

## APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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Circuit Court for Baltimore City
Case # 896262001

IN THE COURT OF APPEALS OF
MARYLAND

No. 9

September Term, 2004

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IN RE: ARIEL G.

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Bell, C.J.
Raker
Wilner
Cathell
Harrell
Battaglia
Greene,

JJ.

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Opinion by Harrell, J.

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Filed: October 5, 2004

On 17 September 1996, the Baltimore City Department of Social Services (BCDSS) took then five year old Ariel G. into protective custody from his mother, Teresa B. BCDSS promptly filed a petition in the Circuit Court for Baltimore City alleging that Ariel was a Child in

Need of Assistance (CINA) based on his mother's refusal to provide him with appropriate medical treatment for his severe asthma. After the court entered an order placing Ariel in protective custody, but before an adjudicatory hearing could be held, Teresa absconded with Ariel.

After three and a half years of eluding the authorities, Teresa was found and arrested on 27 March 2000. Although she refused to disclose Ariel's whereabouts, he subsequently was found and committed by the court to BCDSS under an order of shelter care. The court found Teresa in direct contempt for preventing the court from exercising its jurisdiction over Ariel. She also later was convicted of a violation of the terms of her probation.[1]

Later that year, the court found Ariel to be a CINA and placed him in a foster home in Carroll County. Ariel remained in the foster home until the morning of 9 January 2001, when the foster parents discovered that Ariel was missing from his bedroom. Attempts to locate his mother were unsuccessful, and it was widely speculated that Teresa again had fled with Ariel.

Over the next few months the juvenile court held hearings during which evidence was adduced that, if believed, strongly indicated that Teresa was involved in Ariel's latest disappearance and that Ariel was with her currently. In fact, the prosecutor in Carroll County charged Teresa with kidnapping.[2] In addition, the State

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[1]On 19 January 2001, the Court of Special Appeals, in an unreported opinion, overturned the conviction for direct contempt and the violation of probation.

[2]At the time of oral argument in the present case, we were informed that the kidnapping charge against Teresa

charged her with constructive criminal contempt for conduct unrelated to Ariel's 9 January 2001 disappearance.[3]

Teresa was apprehended once more and jailed in Baltimore City pending a bail hearing. Ariel's whereabouts, however, were unknown. On 3 August 2001, the Circuit Court for Baltimore City held a bail hearing. The court instructed Teresa's counsel in the CINA case to appear with Teresa at a hearing that afternoon. The court, now sitting as a juvenile court, directly questioned Teresa concerning Ariel's whereabouts. Teresa refused to answer, claiming that she was not required to do so based on her Fifth Amendment privilege against self-incrimination. The court found Teresa in direct contempt and ordered her detained until she purged herself of the contempt by disclosing Ariel's whereabouts. The court periodically brought her back over the ensuing months, but each time she refused to answer questions concerning Ariel's whereabouts, resulting in her continued incarceration.

On 5 June 2002, Teresa was brought before the juvenile court once more and given the opportunity to purge her contempt by disclosing the whereabouts of Ariel. Teresa responded by indicating that, because she had been detained for the last ten months, she no longer had knowledge as to Ariel's present location. The court then suggested Teresa could purge the contempt by disclosing

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remained pending.

[3]This charge was based on Teresa's interference with a master's shelter care order. Although Teresa was convicted of this offense also, the Court of Special Appeals reversed the conviction in another unreported opinion filed 12 November 2003.

where she was the last time she saw Ariel prior to her capture and confinement. Teresa refused to answer this question, invoking again her right against self-incrimination. After Teresa refused once more at a hearing on 26 September 2002 to disclose any information concerning her child's whereabouts, Ariel nonetheless was found by BCDSS and placed with relatives. Teresa was released from custody.[4]

Teresa appealed to the Court of Special Appeals from the Circuit Court's 5 June 2002 order finding her in contempt for her refusal to answer questions concerning the last known whereabouts of Ariel.[5] On 10 December 2003, the intermediate appellate court reversed the decision of the juvenile court, concluding that Teresa had a Fifth Amendment privilege to refuse to answer questions regarding her knowledge of Ariel's whereabouts. *In re Ariel G.*, 153 Md. App. 698, 712-13, 837 A.2d 1044, 1052 (2003). The Court of Special Appeals reasoned that the kidnapping charges pending against Teresa in Carroll County presented "reasonable cause to apprehend danger

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[4]Although Teresa was released from custody, she retained a right of appeal as to the contempt determination because Maryland law allows individuals to appeal from a contempt finding despite having been released from the imprisonment brought about by the contempt. *Droney v. Droney*, 102 Md. App. 672, 681-82, 651 A.2d 415, 419-20 (1995).

[5]Although the juvenile court held Teresa in contempt on several occasions over the relevant 13 month period, the Court of Special Appeals held that Teresa's appeal was timely only as to the 5 June 2002 order. *In re Ariel G.*, 153 Md. App. 698, 705-06, 837 A.2d 1044, 1048 (2003).

from a direct answer" to such questions. *Id.* BCDSS sought review in the Court of Appeals by writ of certiorari, which we granted on 8 April 2004. *In re Ariel G.*, 380 Md. 617, 846 A.2d 401 (2004).[6]

I.

The Fifth Amendment to the United States Constitution provides that "No person ... shall be compelled in any criminal case to be a witness against himself." U.S. Const. Amend. V. In order to invoke successfully the protection of the Fifth Amendment, an individual's statement must be compelled, testimonial, and self-incriminating. *Fisher v. U.S.*, 425 U.S. 391, 408, 96 S. Ct. 1569, 1579, 48 L. Ed. 2d 39 (1976) (stating that the Fifth Amendment "applies only when the accused is compelled to make a *testimonial* communication that is incriminating"). This right against self-incrimination is based on the "conviction that too high a price may be paid even for the unhampered enforcement of the criminal law and that, in its attainment, other social objects of a free society should not be sacrificed." *Hoffman v. U.S.*, 341 U.S. 479, 486, 71 S. Ct. 814, 818, 95 L. Ed. 1118 (1951) (citations omitted). To accomplish this aim, the Fifth Amendment allows an individual to refuse, without threat of punishment, to respond to questions the answers to

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[6]The sole question posed in BCDSS's petition for certiorari was: "Did the Court of Special Appeals misconstrue *Baltimore City Department of Social Services v. Bouknight*, 493 U.S. 549[, 110 S. Ct. 900, 107 L. Ed. 2d 992] (1990), in holding that a juvenile court, in exercising its jurisdiction for the protection of a child who has been found to be a Child in Need of Assistance, cannot compel the parent of the child to reveal the child's whereabouts when the child is missing?"

which not only would support a criminal conviction, but also those that would "furnish a link in the chain of evidence needed to prosecute the claimant for a ... crime." *Id.* Although the Fifth Amendment only mentions criminal proceedings, the Supreme Court has held that the right "can be claimed in *any proceeding*, be it criminal or civil, administrative or judicial, investigatory or adjudicatory." *In re Gault*, 387 U.S. 1, 47, 87 S. Ct. 1428, 1454, 18 L. Ed. 2d 527 (1967) (*quoting Murphy v. Waterfront Commission*, 378 U.S. 52, 94, 84 S. Ct. 1594, 1611, 12 L. Ed. 2d 678 (1964) (White, J., concurring)).[7]

As a threshold matter, it is clear that the questions posed to Teresa at the several pertinent hearings in the Circuit Court, including the question posed at the 5 June 2002 hearing, all had the potential, if answered, to implicate her in the charged crime of kidnapping Ariel.[8]

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[7]In certain situations in certain civil proceedings in Maryland courts, such as when a party in a divorce case invokes the Fifth Amendment rather than answer a question regarding whether he or she committed adultery, there may be adverse consequences short of incarceration, such as the drawing of an adverse inference where the information sought is material to the proceedings. *See Robinson v. Robinson*, 328 Md. 507, 515-18, 615 A.2d 1190, 1194-96 (1992) (holding that invocation of Fifth Amendment in response to questions concerning adultery allowed court to take adverse inference in child custody matter).

[8]Because the kidnapping statute, Md. Code (2002), § 3-502 of the Criminal Law Article, explicitly excludes situations in which a minor child is abducted by the child's parent,

The Supreme Court has held that to invoke the right against self-incrimination, "it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer ... might be dangerous because injurious disclosure could result." *Hoffman*, 341 U.S. at 486-87, 71 S. Ct. at 818, 95 L. Ed. 1118. Although it is not certain on this record who, if anyone, assisted Ariel in eloping from the foster home in Carroll County during the early morning hours of 9 January 2001, BCDSS

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we presume that the Carroll County prosecutor charged Teresa under Md. Code (2002), § 3-503 of the Criminal Law Article. Section 3-503 describes the crime of child kidnapping: "A person may not, without color of right:

(i) forcibly abduct, take, or carry away a child under the age of 12 years from:

1. the home or usual place of abode of the child; or

2. the custody and control of the child's parent or legal guardian;

(ii) without the consent of the child's parent or legal guardian, persuade or entice a child under the age of 12 years from:

1. the child's home or usual place of abode; or

2. the custody and control of the child's parent or legal guardian; or

(iii) with the intent of depriving the child's parent or legal guardian, or any person lawfully possessing the child, of the custody, care, and control of the child, knowingly secrete or harbor a child under the age of 12 years."

and the State's Attorney's Office for Carroll County clearly believed that Teresa was responsible. At the time of the hearing on 3 August 2001 in the Circuit Court for Baltimore City, when Teresa was first questioned about her son, the trial judge was aware that she was wanted by Carroll County police on an arrest warrant issued as a result of her alleged involvement in Ariel's disappearance.

Because of the pending kidnapping charges, Teresa had "reasonable cause to apprehend danger from a direct answer" to the court's question concerning Ariel's whereabouts. *Hoffman*, 341 U.S. at 486, 71 S. Ct. at 818, 95 L. Ed. 1118. Questioning Teresa as to the location, or even the last known location, of Ariel possessed the potential for demonstrating her culpability in the alleged kidnapping. Although the juvenile court's primary objective was to determine Ariel's location for his safety, it was clear that his mother's statements not only could be used to locate the child, but also to gather evidence for law enforcement purposes as to how Ariel left the foster home. Such evidence could then be used to discover what role Teresa may have had in Ariel's disappearance.

Furthermore, the threat of prosecution was not hollow or speculative, but rather immediate and certain. *See Choi v. State*, 316 Md. 529, 536-37, 560 A.2d 1108, 1111-12 (1989). The Carroll County prosecutor, through the procurement of an arrest warrant, took affirmative steps to prosecute Teresa for kidnapping her son.[9] Even though her testimony was being compelled in a civil

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[9]Although the Carroll County prosecutor's theory is not clear in the record, the kidnapping charge was apparently based on the supposition that although Ariel may have left the foster home by his own will, he may have returned to his mother, and she had a duty to return him to foster care.

juvenile proceeding, Teresa was well aware that any information she provided to the juvenile court might be used against her in a subsequent criminal trial on the pending kidnapping charge in Carroll County. Her invocation of her Fifth Amendment right was justified.

II.

BCDSS, however, argues that this Court should apply *Baltimore City Department of Social Services v. Bouknight*, 493 U.S. 549, 110 S. Ct. 900, 107 L. Ed. 2d 992 (1990) to conclude that the Fifth Amendment does not apply to proceedings in which the location of a child found to be CINA is at issue. We find the reasoning in *Bouknight* to be inapplicable to the circumstances of the present case.

In *Bouknight*, a mother refused a court order to produce her child. *Id.* at 552, 110 S. Ct. at 903-04, 107 L. Ed. 2d 992. The child had been declared a CINA, based on the mother's consistent physical abuse, and was placed under the oversight of BCDSS. *Id.* at 551-52, 110 S. Ct. at 903, 107 L. Ed. 2d 992. Despite reservations, BCDSS agreed to allow the mother, Jacqueline Bouknight, to continue as the physical custodian of the child, subject to certain conditions placed upon her by a court-approved protective supervision order. *Id.* at 552, 110 S. Ct. at 903, 107 L. Ed. 2d 992. When BCDSS later learned that Bouknight was violating the terms of the protective order, it petitioned the court to remove the child from Bouknight for placement in a foster home, which petition the court granted. *Id.* at 552-53, 110 S. Ct. at 903-04, 107 L. Ed. 2d 992. Bouknight, however, refused to produce the child or reveal to BCDSS the location of the child. *Id.* at 553, 110 S. Ct. at 904, 107 L. Ed. 2d 992. After several hearings at which Bouknight persisted in refusing to produce the child, the juvenile court found Bouknight in contempt and ordered that she be confined until she either produced the child or revealed his whereabouts. *Id.*

The Supreme Court held that the Fifth Amendment could not be invoked successfully to resist the order of the court to produce the child. *Id.* at 555, 110 S. Ct. at 905, 107 L. Ed. 2d 992. Producing the child pursuant to a court order, the Court held, was not a sufficiently testimonial communication and therefore fell outside the boundaries of the Fifth Amendment's protections. *Id.* at 554-59, 110 S. Ct. at 905-07, 107 L. Ed. 2d 992. Furthermore, the Court held that when an individual is subject to a non-criminal regulatory regime, such as a CINA juvenile proceeding, that individual may not rely on the Fifth Amendment to resist an order that furthers the objectives of the regulatory regime. *Id.* at 555-56, 110 S. Ct. at 905, 107 L. Ed. 2d 992. Because Bouknight explicitly had consented to the conditions placed upon her by BCDSS at the time it approved her continuance as the physical custodian, the Court held that Bouknight was subject to the regulatory regime of the BCDSS and thus her ability to invoke the Fifth Amendment was reduced. *Id.* at 558, 110 S. Ct. at 906, 107 L. Ed. 2d 992.

A.

Although *Bouknight*, at first blush, may appear similar factually to the present case, its reasoning is not applicable to the present case. First, in the present case, the juvenile court's contempt order was not based on Teresa's failure to *produce* Ariel, but rather upon her failure to *testify* regarding her knowledge of his whereabouts, first couched in the present tense and later framed in terms of the relatively near past. The Supreme Court long ago held that the Fifth Amendment is inapplicable to a court order requiring the production of documents or other tangible objects. *See Fisher*, 425 U.S. at 409, 96 S. Ct. at 1580-81, 48 L. Ed. 2d 39 (holding that the disclosure of tax documents in the possession of an attorney did not violate the Fifth Amendment even though

the documents contained potentially incriminating information). Although in very limited circumstances the act of production may be testimonial in nature and be afforded Fifth Amendment protection, *U.S. v. Doe*, 465 U.S. 605, 613, 104 S. Ct. 1237, 1242, 79 L. Ed. 2d 552 (1984), the Supreme Court held that the custodian of an object may not withhold it "based upon the incrimination that may result from the contents or nature of the thing demanded." *Bouknight*, 493 U.S. at 555, 110 S. Ct. at 905, 107 L. Ed. 2d 992. In *Bouknight*, the "object" demanded was a child, and the Court held that the act of producing that child was not a testimonial communication, but rather an act of production that fell outside the Fifth Amendment's protection. *Id.* at 554-59, 110 S. Ct. at 905-07, 107 L. Ed. 2d 992.

Teresa, however, was not held in contempt for her failure to produce Ariel, but rather for her refusal to give a purely testimonial communication. At the time of the 5 June 2002 hearing, the juvenile court appeared satisfied that she may not be aware of the present whereabouts of Ariel due to the fact that she had been incarcerated for the previous ten months. Nonetheless, the court surmised that the circumstances of her last contact with Ariel might be of assistance to the authorities in determining his present location. Although Teresa may have been required to produce Ariel if he was within her control, compelling her to inform the court of the whereabouts of the subject of the production order is foreclosed by the Fifth Amendment, if properly asserted as here. *See U.S. v. Hubbell*, 530 U.S. 27, 34-35, 120 S. Ct. 2037, 2042, 147 L. Ed. 2d 24 (2000) (holding that "there is a significant difference between the use of compulsion to extort communications from a defendant and compelling a person to engage in conduct that may be incriminating"); *Curcio v. U.S.*, 354 U.S. 118, 123-24, 77 S. Ct. 1145, 1149, 1 L. Ed. 2d 1225 (1957).

In *Curcio*, the Supreme Court held that a custodian of corporate records could not be compelled to testify regarding the whereabouts of documents that the custodian was required to produce pursuant to a court order. 354 U.S. at 128, 77 S. Ct. at 1151-52, 1 L. Ed. 2d 1225. Although the Fifth Amendment does not allow a custodian to withhold incriminating documents, the privilege does shield a custodian from being compelled to give incriminating testimony about the documents, including their location. *See id.* (stating that "forcing the custodian to testify orally as to the whereabouts of nonproduced records ... is contrary to the spirit and letter of the Fifth Amendment"). Therefore, even if Ariel was within Teresa's custody or control, the court could not overcome the proper assertion of her Fifth Amendment right and compel her to testify about the location of the child. Like the custodian in *Curcio*, Teresa could not be compelled, by threat of incarceration, to "condemn [herself] by [her] own oral testimony" in giving incriminating information relating to Ariel's whereabouts. *Id.* at 124, 77 S. Ct. at 1149, 1 L. Ed. 2d 1225.

B.

In *Bouknight*, the Supreme Court also concluded that because the mother consented to the conditions imposed by BCDSS on the retention of her physical custody of the child, Bouknight subjected herself to the "routine operation of the regulatory system" and therefore her ability to invoke the Fifth Amendment was reduced. 493 U.S. at 558, 110 S. Ct. at 906, 107 L. Ed. 2d 992. In the present case, however, Teresa did not consent to the court's or BCDSS's jurisdiction over Ariel and never agreed to any terms that would allow her to retain any degree of lawful custody over Ariel. Teresa, unlike Bouknight, may not be said to have submitted to the regulatory regime of the BCDSS.

Nonetheless, BCDSS argues that *Bouknight* reaffirms and even extends the holding of *California v. Byers*, 402 U.S. 424, 91 S. Ct. 1535, 29 L. Ed. 2d 9 (1971) that "the ability to invoke the [Fifth Amendment] privilege may be greatly diminished when invocation would interfere with the effective operation of a generally applicable, civil regulatory requirement." *Bouknight*, 493 U.S. at 557, 110 S. Ct. at 906, 107 L. Ed. 2d 992. The compelled disclosures in *Bouknight* and *Byers*, however, are fundamentally different from those sought in the present case.

In *Byers*, the Supreme Court upheld a California statute that required drivers of motor vehicles involved in accidents to stop at the scene and provide their names and addresses. 402 U.S. at 434, 91 S. Ct. at 1541, 29 L. Ed. 2d 9. The Court held that the requirements of the statute were part of a regulatory scheme that "was not intended to facilitate criminal convictions but to promote the satisfaction of civil liabilities arising from automobile accidents." *Id.* at 430, 91 S. Ct. at 1539, 29 L. Ed. 2d 9. Conceding that it was possible that the act of stopping and revealing one's name and address at the scene of an accident could be incriminating, the Court nonetheless reasoned that the statute's requirements did not implicate the Fifth Amendment because the act of stopping was not a testimonial act[10] and that the disclosure of one's name

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[10]The Court explained that the act of stopping one's vehicle at the scene of an accident was less testimonial "than requiring a person in custody to stand or walk in a police lineup, to speak proscribed words, or to give samples of handwriting, fingerprints, or blood." *Byers*, 402 U.S. at 431-32, 91 S. Ct. at 1539-40, 29 L. Ed. 2d 9 (citations omitted).

and address was "an essentially neutral act." *Id.* at 431-32, 91 S. Ct. at 1539-40, 29 L. Ed. 2d 9; *See also Hiibel v. Sixth Judicial Dist. Court*, __ U.S. __, 124 S. Ct. 2451, 2461, 159 L. Ed. 2d 292 (2004) (upholding a regulatory statute requiring individuals, when asked to do so, to give their name to police officers based on reasoning that "[a]nswering a request to disclose a name is likely to be so insignificant in the scheme of things as to be incriminating only in unusual circumstances").

In the present case, it is quite clear that requiring Teresa to testify about her knowledge of Ariel's whereabouts is completely testimonial and not "an essentially neutral act." *See Hubbell*, 530 U.S. at 37 n.19, 120 S. Ct. at 2044 n.19, 147 L. Ed. 2d 24 (quoting *Doe v. U.S.*, 487 U.S. 201, 209, 108 S. Ct. 2341, 2347, 101 L. Ed. 2d 184 (1988) (stating that "in order to be testimonial, an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information"). The mere existence of a civil regulatory system may not trump the essence of the Fifth Amendment - to foreclose situations where individuals are compelled to give incriminating *testimony*. *Bouknight*, 493 U.S. at 561, 110 S. Ct. at 908, 107 L. Ed. 2d 992. The Court in *Bouknight* held that a parent may not rely on the Fifth Amendment primarily because the act of producing a child, though potentially incriminating, was no different than the production of incriminating tax records or corporate documents. *Id.* at 559-61, 110 S. Ct. at 907-08, 107 L. Ed. 2d 992. Although the *Bouknight* Court relied in its reasoning, to a degree, on the existence of a noncriminal regulatory regime, it held that the result would have been different had the juvenile court sought to compel incriminating testimony rather than the production of evidence, or in this case, the child. *Id.* at 561, 110 S. Ct. at 908, 107 L. Ed. 2d 992 (stating that a noncriminal

regulatory system "may neither compel incriminating testimony nor aid a criminal prosecution"). Furthermore, the reasoning in *Byers* was not based on the incriminating nature of the motorist's statements, but rather on the rationale that the disclosures required by the statute were not testimonial nor inherently incriminating and, therefore, did not fall within the protective penumbra of the Fifth Amendment. 402 U.S. at 431-32, 91 S. Ct. at 1539-40, 29 L. Ed. 2d 9.

The primary distinction between *Bouknight* and *Byers* on the one hand and the present case is that the compelled statement sought from Teresa meets the threshold test for a situation where the Fifth Amendment may be invoked properly, namely, the information sought was compelled, testimonial in nature, and bore a sufficient likelihood of being incriminating. Furthermore, Teresa did not subject herself voluntarily to the regulatory scheme of the BCDSS, and she obviously feared the potential use of her responses in the pending criminal proceeding. *Bouknight* counsels us that the Fifth Amendment retains its vigor, despite the existence of a regulatory regime, when the compelled disclosures are of the type normally covered by the Fifth Amendment. 493 U.S. at 561, 110 S. Ct. at 908, 107 L. Ed. 2d 992. At most, the existence of a regulatory regime acts to narrow the applicability of the Fifth Amendment. Nonetheless, when the operation of a regulatory regime demands testimony that may be incriminating, the Fifth Amendment may be invoked.

III.

Although we conclude that Teresa was entitled to refuse to answer the inquiries of the court, our holding does not carry with it any blessing of Teresa's role, if any, in spiriting Ariel from foster care. When a child is taken properly into State custody to prevent further abuse, it is imperative that the State do all within its power to ensure

that the child is provided with a safe and healthy environment. *See Bouknight*, 493 U.S. at 559, 110 S. Ct. at 907, 107 L. Ed. 2d 992 (stating that once the child is "adjudicated a [CINA], his care and safety [become] the particular object of the State's regulatory interests"). By fleeing with Ariel, if she did, Teresa denied the State the opportunity to provide the child with proper medical treatment, and in turn she, at the least, may have denied Ariel his right to be healthy and to receive a proper education.

The State argues that the "societal interest in protecting children transcends the Fifth Amendment privilege against self-incrimination and cannot be a barrier to compelling the disclosure of information necessary to protect human life." Viscerally and emotionally, this is an argument of some persuasive force. Although it is true that the interest in protecting children, especially children in the custody of the State, is an extremely important interest, however, such an interest does not justify abandonment of our constitutional foundations. *See in re Gault*, 387 U.S. at 47, 87 S. Ct. at 1454, 18 L. Ed. 2d 527 (stating that the "language of the Fifth Amendment ... is unequivocal and without exception. And the scope of the privilege is comprehensive."). The availability of the right against self-incrimination depends not on what is at stake for the courts or society at large, but what is at stake for the potential defendant. Therefore, when a court demands incriminating testimony, the subject matter or type of proceeding, whether it be juvenile or criminal, does not diminish the force and applicability of the right against self-incrimination. *Id.*

Several other courts have addressed whether the assertion of the right against self-incrimination should be balanced against the State's interest in protecting abused or missing children. *See, e.g., In re J.A.*, 699 A.2d 30, 31 (Vt.

1997); *In re Welfare of J.W.*, 415 N.W.2d 879, 882-83 (Minn. 1987); *In re Amanda W.*, 705 N.E.2d 724, 727-28 (Ohio Ct. App. 1997). These cases demonstrate that while the courts must make every effort to protect the interests of children, they must do so within constitutional limits. For example, *In re Welfare of J.W.* concerned whether the State could deny custody to a couple of their children based on the couple's refusal, grounded in the Fifth Amendment, to engage in court-ordered therapy that would require them to make incriminating admissions about the abuse of a nephew. 415 N.W.2d at 883. The Minnesota Supreme Court held that the State could not compel therapy treatment that would require the couple, by their own words, to incriminate themselves. *Id.* at 883. Although the court made special effort to consider the best interests of the children, it ultimately held that the ability to assert a constitutional right should not yield to the fulfillment of a course of action that may be in the best interests of a child. *Id.* at 883-84.

Likewise, the State here may not rely on a "best interests of Ariel" argument to compel Teresa to incriminate herself. She was not offered or granted use immunity for her role, if any, in Ariel's disappearance on 5 June 2002.[11] Once a recalcitrant parent is granted use immunity, the threat of using his or her statement against that person is lifted and the parent must testify or face contempt of court charges. The court may then punish a

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[11]Md. Code (1973, 2002 Repl. Vol.), § 9-123 of the Courts and Judicial Proceedings Article allows a prosecutor to seek a grant of use immunity from the court when the testimony of a witness may be necessary to the public interest or the prosecutor anticipates that the witness will invoke the Fifth Amendment.

parent who refuses to testify without offending the constitutional guarantees of the Fifth Amendment. *See Kastigar v. U.S.*, 406 U.S. 441, 453, 92 S. Ct. 1653, 1661, 32 L. Ed. 2d 212 (1972) (stating that "immunity from use and derivative use is coextensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of the privilege"). In doing so, the court balances its interest in prosecuting unlawful conduct and providing for the welfare of abused and missing children, all while respecting the accused's constitutional rights.

All that the Fifth Amendment requires is that a criminal defendant not be forced to give testimony that could be used to incriminate himself or herself. The State is free to pursue kidnapping charges against Teresa, but it must do its own homework. The State may not force Teresa to condemn herself any more than the State may force the common thief to be a witness against himself or herself.

**JUDGMENT OF THE COURT OF SPECIAL APPEALS AFFIRMED. COSTS TO BE PAID BY PETITIONER.**

| | | |
|---|---|---|
| IN RE: ARIEL G. | * | In the<br>Court of Appeals of Maryland |
| | * | |
| | | Petition Docket No. 618 |
| | * | September Term, 2003 |
| | * | (No. 1570<br>September Term, 2002 |
| | * | Court of Special Appeals) |

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals and the answer filed thereto, in the above entitled case, it is this 8th day of April, 2004

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, granted, and a writ of certiorari to the Court of Special Appeals shall issue; and it is further

ORDERED, that said case shall be transferred to the regular docket as No. 9, September Term, 2004; and it is further

ORDERED, that counsel shall file briefs and printed record extract in accordance with Md. Rules 8-501 and 8-502, petitioner's brief and record extract to be filed on or before June 1, 2004; respondent's brief to be filed on or before July 1, 2004; and it is further

ORDERED, that this case shall be set for argument during the September session of Court.

/s/ Robert M. Bell
Chief Judge

REPORTED

IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1570
September Term, 2002

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IN RE: ARIEL G.

Davis,
Salmon,
Moylan, Charles E., Jr.
(Ret., Specially Assigned),

JJ.

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Opinion by Salmon, J.

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Filed: December 10, 2003

Ariel G., who was born on January 28, 1991, is the son of Teresa Brock. On September 18, 2000, the Circuit Court for Baltimore City found Ariel to be a child in need of assistance (CINA) and placed him in the custody of the Baltimore City Department of Social Services (BCDSS).

The BCDSS put Ariel in a Carroll County foster home, but on January 9, 2001, he left the home without permission. Police looked for Ariel's mother, Ms. Brock, but could not locate her. Soon thereafter, the police came to believe that Ms. Brock had absconded with Ariel.

Meanwhile, Ms. Brock had been charged in the Circuit Court for Baltimore City with constructive contempt of court for other (unrelated) misconduct involving Ariel. A bail hearing was held on August 3, 2001, on the constructive contempt matter.

After bail was set, Ms. Brock was brought back into court, before the same judge who had presided at the bond hearing but who was then sitting in his capacity as a juvenile court judge. A hearing was held by the juvenile court judge concerning the whereabouts of Ariel. Ms. Brock objected to the hearing, on the ground that neither she nor her counsel had received adequate notice of the hearing. Counsel said:

> First and foremost, I've not been given any notice of what proceeding was going to be called when your office called me this afternoon at two o'clock and left a message; it was simply that Ms. Brock was here and to get over here. And I've done so. The first thing that I was presented with was a constructive criminal contempt petition that was served on my client and myself, and I've dealt with that matter. I have no idea what Mr. Cohen [an attorney for the BCDSS] intends to call. I was only told that whatever CINA cases would also be added to the docket. I have a great concern, Your Honor, with notice in both of these matters. That effectively, I received notice at two o'clock this afternoon that my client was going to be brought before the court. All I was told about the CINA case is that they were adding a CINA case to the docket. And now I hear that it's the civil contempt, when we've just dealt with the criminal

> contempt. I have not received any notice of any petition of the civil contempt Your Honor.
>
> The prosecutor responded,
>
> Your Honor, there is no petition. The issue is that Ms. Brock has absconded with the child. The court needs to ask her where the child is and then we'll deal with what happens after [unclear]. There's no petition in this case yet. Until the court confronts Ms. Brock with the question as to whether or not she's in contempt of court.

The court was informed by Mr. Cohen that two representatives of the Carroll County State's Attorney's office had advised him that Ms. Brock "had indicated that she does have the child." The court then asked Ms. Brock, "Do you know anything about the whereabouts of Ariel G.?" After conferring with counsel, Ms. Brock declined to answer the question on Fifth Amendment grounds. Immediately thereafter, the court said, "Well, I find you in contempt. And you will remain in jail until you purge yourself of that contempt by revealing the whereabouts of Ariel G."

A written order was entered by the court that read, in pertinent part:

> The following order(s) resulted from a Child in Need of Assistance hearing. As a result of the other (miscellaneous) hearing in the above case(s), the Court finds:
> The mother was present, and represented by APD [Assigned Public Defender] Beverly Schulterbrandt.

The BCDSS posed the question to the mother as to the whereabouts of her son.
The court asked the mother the question as to the whereabouts of her son.
The mother invoked her 5th Amendment to remain silent.

The court ordered that the mother remain in the BCDC [Baltimore City Department of Corrections] under Civil Contempt, until she purges the contempt by revealing the whereabout of her son.

It is further ordered that the Clerk of the Court cause a copy of this order to be served upon the parties to this proceeding.

So ordered by this Court, on this 6th day of August, 2001.

No appeal was filed from the August 6, 2001, order.

A purge review hearing was held on January 16, 2002, and Ms. Brock again refused to answer the court's question as to the whereabouts of Ariel G. Due to her failure to answer the same question as previously posed, her imprisonment was continued.

Another purge hearing was held on June 5, 2002. This time Ms. Brock said she did not know Ariel's present whereabouts because she had not seen him for ten months. The following then transpired,

[COUNSEL FOR BCDSS]: Where were you when you last saw him ten months ago?

A. I have to plead the Fifth on that.

Q. I can't hear you.

A. I cannot answer that at this time. I have a [pending] criminal case. I take the Fifth Amendment. I have a case pending in Carroll County.

Q. Okay. So your answer is that you take the Fifth Amendment, right? But the last time you saw him you said was ten months ago?

The criminal charges to which Ms. Brock referred were charges pending in Carroll County arising from her (alleged) act of absconding from the foster home with Ariel G.

The court orally ruled as follows:

She knew where he was ten months ago. Now that question has been asked and she will not reveal where he was ten months ago based on her Fifth Amendment privilege. And the problem that I have is if she was willing to tell [where] he was ten months ago then there would have be[en] an attempt to purge but there has been no attempt to purge.

* * *

She hasn't answered the question. And (unintelligible) where the child is and she certainly knew where he was ten months ago. The child is committed to the Department of Social Services and she took him away from the Department of Social Services.

* * *

She has not purged herself of the civil contempt, and she will be returned to the jail.

The juvenile court judge's June 26, 2002, order read, in relevant part:

> The following order(s) resulted from a Child in Need of Assistance hearing. As a result of the Review hearing in the above case(s), the Court finds:
> Respondent's mother - Teresa Brock [-] was transported to court by BCDC. Respondent still remains missing and has an outstanding runaway warrant out on him. Mother has a pending case in Carroll County.
>
> Mother - Teresa Brock [-] has failed to advise the [c]ourt of . . . [r]espondent's whereabouts. Mother - Teresa Brock [-] is still in Civil Contempt and is remanded to BCDC.

An appeal was filed from the June 26, 2002, order.

Ms. Brock had another purge hearing on September 26, 2002, at which she again failed to divulge the whereabouts of Ariel G. The juvenile court, by an order dated September 29, 2002, ruled that Ms. Brock was still in contempt. No appeal was taken from the September 29, 2002, order.

Sometime after September 29, 2002, Ariel G. was located by BCDSS. He was placed with relatives, and Ms. Brock was released from custody on the contempt charge(s).

## QUESTIONS PRESENTED

1. Was this appeal timely filed?
2. Where Ms. Brock faced pending charges of [absconding with] her

child from foster care, and was at risk of criminal contempt charges, was the contempt order [resulting from her failure to testify as to where she was when she last saw her child] entered in violation of Ms. Brock's privilege against self-incrimination?

3. Did the lower court violate the Maryland Rules and principles of due process by holding Ms. Brock in direct civil contempt when she invoked her privilege against self-incrimination and refused to disclose her knowledge of the whereabouts of her child?

## I. FIRST ISSUE

Generally speaking, persons held in contempt of court are entitled to maintain an appeal from a contempt finding despite having been released from the imprisonment brought about by the (alleged) contempt. *Droney v. Droney*, 102 Md. App. 672, 682 (1995) ("With contempt . . . even if the purge cannot be undone, and thus the party cannot be made "whole," the party remains entitled to seek exoneration of the contempt finding.); *Williams v. Williams*, 63 Md. App. 220, 225-26 (1985)(same); *Jones v. State*, 61 Md. App. 94, 96 (1984)(same). In this case, however, no immediate appeal order was filed from the initial order holding appellant in contempt, nor were appeals filed from the orders dated January 16, 2002, and September 29, 2002, in which the court ruled that appellant had failed to purge herself of contempt.

It is now too late to file an appeal as to the orders filed on August 6, 2001; January 16, 2002; and September 29, 2002. The period for filing an appeal expired thirty days after that order was entered.[12] Appellant failed to file an appeal from these contempt findings within thirty days. *See Droney* 102 Md. App. at 681 (citing and applying rule that parties must file any appeals within thirty days of the entry of judgment).

The question then becomes: Is it now too late to file an appeal from the June 26, 2002, order in which the court made a written finding that appellant had failed to purge herself of contempt?

*United States v. Wheeler*, 952 F. 2d 326 (9th Cir. 1991), involved a defendant who was ordered by the Court to turn over certain records to the Internal Revenue Service. *Id.* at 326-27. The defendant failed to comply with the court's order and was held in contempt. *Id.* at 327. The defendant did not appeal that order, but about five months after being held in contempt, the defendant filed a pleading that the District Court treated as a motion to vacate the earlier contempt order. *Id.* The *Wheeler* Court held that "a district court's order refusing to vacate an underlying contempt order is nonappealable when the ground on which vacatur is sought existed at the time the contempt order was entered and the contemnor failed to appeal timely from the order." *Id.* at 327. The *Wheeler* court went on to say:

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[12]*See* Md. Code Ann., Cts. & Jud. Proc. § 12-304(a) (2001); Md. Rule 2-601(b) (fixing the date for filing appeals from final judgments); Md. Rule 8-202(a)("[T]he notice of appeal shall be filed within 30 days after entry of the judgment or order from which the appeal is taken.").

> [I]f a contemnor may appeal an order denying vacatur of a contempt order merely by a continuing inability to comply with the order, the time limit of Fed. R. App. P. 4(a) will have little meaning. The contemnor would be able to indefinitely extend the deadline for appealing the issue of his ability to comply.

*Id.*

The court's order of June 26, 2002, however, stands on a different legal footing from the order discussed in *Wheeler*. First, this case does not involve a motion to vacate a contempt finding. Second, the purportedly contemptuous conduct that caused the court to rule in June 2002 that the contempt had not been purged was different from the conduct that had caused the original contempt finding. As mentioned earlier, at the first and second hearings, the question appellant refused to answer was, in substance: "Where is the child?" When appellant was asked at the June 2002 hearing that same question, she said she did not know Ariel G.'s present whereabouts. That answer was not contradicted or impeached.

The question appellant refused to answer at the June 2002 hearing was: "Where were you when you last saw [Ariel G.] ten months ago?" The court ruled that appellant had not purged the contempt by failing to answer that new question. Appellant filed an appeal within thirty days of the June 26, 2002, order from that contempt finding.[13] As to the order dated June 26, 2002, the appeal was timely. *See United States v. Brumfield*, 188 F.3d 303, 306 (1999)(an order holding that an individual who has been adjudicated in contempt had not purged himself of

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[13] The court's June 26, 2002, order does not accurately state the nature of the question appellant refused to answer.

contempt is a final appealable order); *see also Consolidated Rail Corp. v. Yorkinsky*, 170 F.3d 591, 594 (6th Cir. 1999); *Doe v. United States (In re Grand Jury Subpoena)*, 150 F.3d 170, 172 (2d Cir. 1998).

Based on the federal precedent above mentioned, we hold that the appeal from the June 26, 2002, order was timely.

**II.**

Appellant contends that she had a right, protected by the Fifth Amendment to the Constitution of the United States, to refuse to answer the question, "Where were you when you last saw [Ariel G.] ten months ago?"

> [T]he privilege against compelled self-incrimination, under both the Fifth Amendment and Article 22 of the Declaration of Rights, must be accorded a liberal construction in favor of the right that it was intended to secure.

*Choi v. State*, 316 Md. 529, 536 (1989)(internal quotation marks omitted).

> We have consistently applied the standards of *Hoffman v. United States*, 341 U.S. 479, 71 S. Ct. 814, 95 L. Ed. 2d 1118 (1951), that a witness is entitled to invoke the privilege against self-incrimination if "the witness has reasonable cause to apprehend danger from a direct answer: . . . and that:
>
> > To sustain the privilege, it need only be evidence from the implications of the question, in the setting in which it is asked, that a responsive answer to the

> question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.
>
> The Court in *Hoffman* concluded that, in the case before it, the claim of privilege should have been allowed because the witness "could reasonably have sensed the peril of prosecution" and because "it was not '*perfectly clear*, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer[s] *cannot possibly* have such tendency' to incriminate.

*Id.* at 536-37 (citations omitted)(emphasis in original).

The BCDSS claims that appellant had no Fifth Amendment right to refuse to answer the question propounded at the June 2002 purge hearing. It bases its position almost entirely on *Baltimore City Department of Social Services v. Bouknight*, 493 U.S. 549, 551-52 (1990). The *Bouknight* case involved the BCDSS's efforts to locate Maurice M. ("Maurice"), the son of Bouknight. Due to abuse visited upon Maurice by Ms. Bouknight, Maurice was adjudicated to be a CINA and placed under BCDSS's supervision. *Id.* at 552. BCDSS, despite the abuse, agreed that Maurice should remain in Ms. Bouknight's custody, "but only pursuant to extensive conditions set forth in a court-approved protective order." *Id.* Among the conditions in the protective order, to which Ms. Bouknight agreed, were requirements that she "cooperate with BCDSS, follow a prescribed training regimen and be subject to further court orders." *Id.* at 559.

Eight months after the consent order was signed, BCDSS returned to the juvenile court and asked that

Maurice be removed from Ms. Bouknight's care and custody. The BCDSS was concerned, *inter alia*, that Maurice might be dead because Ms. Bouknight would not reveal his whereabouts, nor had the BCDSS been able to locate Maurice through its own investigative efforts. *Id.* at 552-53.

Ms. Bouknight was held in contempt by the juvenile court due to her failure to produce Maurice after having been ordered by the court to do so. The juvenile court (1) rejected Ms. Bouknight's claim that the contempt order violated her Fifth Amendment privilege against self-incrimination and (2) ordered that she be imprisoned until she produced the child. *Id.* The Maryland Court of Appeals reversed, holding that the contempt order unconstitutionally compelled Ms. Bouknight to admit, through the act of production, "a measure of continued control and dominion over Maurice's person," even though Ms. "Bouknight had a real apprehension that she will be prosecuted." *In re Maurice M.*, 314 Md. 391, 404 (1988).

The United States Supreme Court reversed the Maryland Court of Appeals, holding:

> The possibility that a production order will compel testimonial assertions that may prove incriminating does not, in all contexts, justify invoking the privilege to resist production. *See infra*, at 556-558. Even assuming that this limited testimonial assertion is sufficiently incriminating and "sufficiently testimonial for purposes of the privilege," *Fisher* [*v. United States*, 425 U.S. 391], 411 [(1976)], Bouknight may not invoke the privilege to resist the production order because she has assumed custodial duties related to production and because

> production is required as part of a noncriminal regulatory regime.

493 U.S. at 555-56 (emphasis added).

The Supreme Court's *Bouknight* holding was based on a line of cases in which it had held that "the ability to invoke the privilege may be greatly diminished when invocation would interfere with the effective operation of a generally applicable, civil regulatory requirement" – in contrast to enforcement directed at a select group suspected of criminal activity. *Id.* at 557-58.

After discussing several cases in which the Supreme Court had recognized "the Fifth Amendment privilege may not be invoked to resist compliance with a regulatory regime constructed to effect the State's public purposes unrelated to the enforcement of its criminal laws," the Court concluded:

> Once Maurice was adjudicated a child in need of assistance, his care and safety became the particular object of the State's regulatory interests. *See* 314 Md. at 404, 550 A.2d at 1141; Md. Cts. & Jud. Proc. Code Ann. §§ 3-801(e), 3-804(a)(Supp. 1989); *see also* App. 105 ("This court has jurisdiction to require at all times to know the whereabouts of the minor child. We asserted jurisdiction over that child in the spring of 1987 . . ."). Maryland first placed Maurice in shelter care, authorized placement in foster care, and then entrusted responsibility for Maurice's care to Bouknight. By accepting care of Maurice subject to the custodial order's conditions (including requirements that she cooperate with BCDSS, follow a prescribed training regime, and be subject to further court

order), Bouknight submitted to the routine operation of the regulatory system and agreed to hold Maurice in a manner consonant with the State's regulatory interests and subject to inspection by BCDSS. *Cf. Shapiro v. United States, supra.* In assuming the obligations attending custody, Bouknight "has accepted the incident obligation to permit inspection." *Wilson*, 221 U.S. at 382. The State imposes and enforces that obligation as part of a broadly directed, noncriminal regulatory regime governing children cared for pursuant to custodial orders. *See* Md. Cts. & Jud. Proc. Code Ann. § 3-802(a)(1984)(setting forth child protective purposes of subtitle, including "providing for the care, protection, and wholesome mental and physical development of children coming within the provisions of this subtitle"); *see also* Md. Cts. & Jud. Proc. Code Ann. §§ 3-820(b), (c)(Supp. 1989); *In re Jessica M.*, 312 Md. 93, 538 A.2d 305 (1988).

Persons who care for children pursuant to a custody order, and who may be subject to a request for access to the child, are hardly a "selective group inherently suspect of criminal activities." *Marchetti, supra*, at 57 (quoting *Albertson v. Subversive Activities Control Board, supra*, at 79). The juvenile court may place a child within its jurisdiction with social service officials or "under supervision in his own home or in the custody or under the

guardianship of a relative or other fit person, upon terms the court deems appropriate." Md. Cts. & Jud. Proc. Code Ann. § 3-820(c)(1)(i)(Supp. 1989). Children may be placed, for example, in foster care, in home of relatives, or in the care of state officials. *See, e.g., In re Jessica M., supra; In re Arlene G.*, 301 Md. 355, 483 A.2d 39 (1984); *Maryland Dept. of Health and Mental Hygiene v. Prince George's County Dept. of Social Services*, 47 Md. App. 436, 423 A.2d 589 (1980). Even when the court allows a parent to retain control of a child within the court's jurisdiction, that parent is not one singled out for criminal conduct, but rather has been deemed to be, without the State's assistance, simply "unable or unwilling to give proper care and attention to the child and his problems." Md. Cts. & Jud. Proc. Code Ann. § 3-801(e)(Supp. 1989); *see In re Jertrude O.*, 56 Md. App. 83, 466 A.2d 885 (1983), *cert. denied*, 298 Md. 309, 469 A.2d 863 (1984). The provision that authorized the juvenile court's efforts to gain production of Maurice reflects this broad applicability. *See* Md. Cts. & Jud. Proc. Code Ann. § 3-814(c)(1984)("If a parent, guardian, or custodian fails to bring the child before the court when requested, the court may issue a writ of attachment directing that the child be taken into custody and brought before the court. The court may proceed against the parent, guardian, or custodian for contempt"). This provision "fairly may be

> said to be directed at . . . parents, guardians, and custodians who accept placement of juveniles in custody." 314 Md. at 418, 550 A.2d at 1148 (McAuliffe, J., dissenting).

*Id.* at 559-60.

As can be seen, the Supreme Court placed heavy emphasis on the fact that Ms. Bouknight had, prior to being held in contempt, agreed to assume various obligations, which accompanied the grant to her of custody of Maurice, including her obligation to hold her son "in a manner consonant with the State's regulatory interest and subject to inspection by BCDSS." According to the Supreme Court majority, enforcement of the regulatory scheme as against Ms. Bouknight was not directed against a selective group suspected of criminal activity, inasmuch as Ms. Bouknight had agreed to the regulatory scheme and had agreed to cooperate with BCDSS in the enforcement of its regulatory scheme.

Factually, the case *sub judice* is distinguishable from *Bouknight* for the following reasons: (1) appellant never agreed to cooperate with BCDSS in any fashion; (2) Ms. Brock was never asked to produce anything; instead, she was held in contempt for her refusal to give testimony; and (3) BCDSS was not entitled to an answer to the question she refused to answer because a response was not required "as a part of a non-criminal regulatory regime."

BCDSS makes the following argument:

> In *Bouknight*, the Supreme Court found that the juvenile court's requests for access to the child did not 'focus almost exclusively on conduct which [is] criminal.' [*California v.*] *Byers*, 402 U.S. [424,] 424 [(1971)], 91 S. Ct. at 1551 (Harlan, J., concurring in judgment). Many orders will arise in circumstances entirely devoid of criminal

> conduct. Even when criminal conduct may exist, the court may properly request production and return of the child, and enforce that request through the exercise of the contempt power, for reasons related entirely to the child's well-being and through measures unrelated to criminal law enforcement or investigation.
> Bouknight, 493 U.S. at 560-61.
>
> Appellant's argument to the contrary notwithstanding, *Bouknight* sets the standard against which Teresa B.'s Fifth Amendment claim must be scrutinized. While the Supreme Court in *Bouknight* addressed this issue from the standpoint of the court's order to produce the child, there is simply no appreciable difference in an order requiring production of a child and an order requiring the disclosure of the child's whereabouts. Moreover, reading *Bouknight* together with *California v. Byers*, 402 U.S. 424 (1971), on which the *Bouknight* Court relied, also leads to the conclusion that Teresa B.'s silence in this case was not entitled to protection.

We disagree. First, the above excerpt from the *Bouknight* opinion chosen by BCDSS is inapposite because (1) this case does not involve a refusal to produce and (2) the June 2002 order of court did not arise "in circumstances entirely devoid of criminal conduct," because appellant invoked her Fifth Amendment privilege after she had been charged with criminal activity that was clearly linked to the question she refused to answer.

BCDSS reads the order dated June 2002 as meaning that appellant was held in contempt for failing to divulge Ariel's present whereabouts. If that reading of the June 2002 order were accurate, the order could not possibly be affirmed because there was no evidence from which it could be inferred that the appellant gave an untruthful answer when she said she did not know her son's present whereabouts; accordingly, the court had no right to hold appellant in contempt for giving the "I do not know" answer.

Appellant interprets the June 2002 order to mean that she was being held in contempt for failing to answer the question, "Where were you when you last saw Ariel G. ten months ago?" We believe appellant's interpretation to be correct based on what the judge said immediately after appellant's June 2002 testimony. Refusal to answer that question is appreciably different from the failure by the mother in *Bouknight* to comply with an order to produce her child. This latter statement is true, *inter alia*, because, unlike a failure to produce a minor child, a failure to answer the question here at issue "would not interfere" with the effective operation of a generally applicable, "civil regulatory requirement."

We hold that appellant had a right, protected by the Fifth Amendment to the United States Constitution, to decline to answer when asked where she was ten months previously when she last saw her son inasmuch as she had "reasonable cause to apprehend danger from a direct answer" in light of the pending Carroll County charges.[14]

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[14] The appellee did not contend that appellant waived her Fifth Amendment privilege when she answered the question concerning the present whereabouts of her child. It is understandable why no such contention was raised. In

5 LYNN MCLAIN, MARYLAND EVIDENCE § 514.3 (1987), the author states:

> A witness who is not a criminal defendant in the case being tried has no privilege not to take the stand and waives no privilege by taking the stand. The witness waives the privilege against self-incrimination only if the witness is asked a question which calls for an answer which will tend to incriminate the witness, and the witness fails to assert the privilege but instead answers the question. Once a witness has disclosed certain incriminating facts, the privilege is unavailable with regard to the details: no further risk of incrimination remains.

(Footnotes omitted)(emphasis added).

Appellant's answer (given in a civil proceeding) that she did not know her child's present whereabouts because she had not seen him in ten months was not one that would tend to incriminate her. Ariel G., at the time she gave that answer, had been "AWOL" for about seventeen months. On the other hand, the question appellant declined to answer had the potential of incriminating her because a truthful answer might well have enabled the State to "backtrack" Ariel G.'s activities and thereby prove that appellant had a hand in his elopement from BCDSS's custody.

*Rogers v. United States*, 340 U.S. 367 (1951), is the lead case regarding the waiver of a witness's Fifth Amendment privilege. The discussion of *Rogers* in 3 WAYNE LAFAVE ET AL., CRIMINAL PROCEDURE § 8.10(e)

(2d ed. 1999), is illuminating:

> **(e) Waiver.** Assuming the witness receives whatever warnings, if any, that are constitutionally required, the privilege may be relinquished by the witness without an express statement of waiver. When the witness answers the question, his waiver is automatically assumed. Indeed, a witness may, by providing certain incriminating information, relinquish her right to raise the privilege with respect to further incriminating information. *Rogers v. United States* is the leading case on such "testimonial waiver." The witness there testified before a grand jury that, as treasurer of [the] Communist Party of Denver, she had been in possession of party records, but had subsequently delivered those records to another person. She refused, however, to identify the recipient of the records, asserting that would be incriminating. A divided Supreme Court affirmed her contempt conviction, holding the privilege inapplicable. The Court noted that Rogers had already incriminated herself by admitting her party membership and past possession of the records; disclosure of her "acquaintanceship with her successor present[ed] no more than a 'mere imaginary possibility' of increasing the danger of prosecution." A witness would not be

allowed to disclose a basic incriminating fact and then claim the privilege as to "details." To uphold such a claim of the privilege would "open the way to distortion of facts by permitting a witness to select any stopping point in her testimony."

Although *Rogers* often is described as posing great danger for the witness who answers even seemingly "innocuous questions," the decision actually is fairly limited. Courts have held, for example, that where a witness' initial admission related to only one element of an offense, that did not constitute a waiver as to questions that might require him to admit other elements of the offense. The fact that the second question asks for further detail as to the same event does not in itself establish that the privilege is not available. Indeed, most of the reported cases finding waiver have involved, as did *Rogers*, a refusal to "name others" in a setting in which it appears likely that the witness is concerned about incriminating those persons rather than herself.

(Footnotes omitted)(alteration in original).

Lastly, an inference that appellant waived her Fifth Amendment privilege would require a determination that she began her testimony "freely and voluntarily, knowing that [her] answer to any questions would be interpreted as

*Hoffman v. United States*, 341 U.S. 479, 486 (1951). Therefore, the trial court erred in holding appellant in contempt for failure to answer that question.

**III.**

In view of our holding that appellant had a Fifth Amendment privilege to refuse to answer the question that led to the contempt finding, there is no need to answer the question of whether the court failed to follow the requirements of the Maryland Rules prior to entering a contempt finding.

**JUDGMENT REVERSED;**
**COSTS TO BE PAID BY APPELLEE.**

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a waiver." *Martin v. Flanagan, State's Attorney*, 789 A.2d 979, 987 (2002). No warnings were given in this case and therefore no such inference can be drawn.

| | | |
|---|---|---|
| MATTER OF | * | IN THE CIRCUIT COURT |
| Ariel J. G. | | FOR BALTIMORE CITY |
| (0163529) | * | DIVISION FOR |
| – DOB 01/28/1991 | | JUVENILE CAUSES |
| Age 011 | * | |
| | | Petition No. 896262001 |

**********

ORDER

The following order(s) resulted from a Child in Need of Assistance hearing. As a result of the Review hearing in the above case(s), the Court finds:

Mother produced by BCDC and testified under oath that she has no knowledge of the respondent's whereabouts.

Mother has pleaded the fifth amendment today for further questioning.

Mother failed to purge herself and is remanded to BCDC.

Respondent is on runaway status.

Open warrant to remain open.

Issue a writ to BCDC for the mother to be present for the next review hearing.

The next court action will be a(n) Review court order on September 26, 2002 at 9:00 a.m. in Pt 12/434. The following persons were present and have been given notice of this hearing:

Teresa B. (Mother)

Morris Richmond (Social Wrk)
Steven Cohen (Atty BCDSS)
Ellen W. Hyers (ApAtt Chld)

It is further ordered that the Clerk of this Court cause a copy of this order to be served upon the parties to this proceeding.

So ordered by this Court, on this 5th day of June, 2002.

Signed by: /s/ Joseph H. H. Kaplan
Judge

**Maryland Children In Need Of Assistance Statute**
**Annotated Code of Maryland**
**Courts and Judicial Proceedings**
**§§ 3-801 - 3-830**

**§ 3-801. Definitions**

(a) In this subtitle the following words have the meanings indicated.

(b) "Abuse" means:

(1) Sexual abuse of a child, whether a physical injury is sustained or not; or

(2) Physical or mental injury of a child under circumstances that indicate that the child's health or welfare is harmed or is at substantial risk of being harmed by:

(i) A parent or other individual who has permanent or temporary care or custody or responsibility for supervision of the child; or

(ii) A household or family member.

(c) "Adjudicatory hearing" means a hearing under this subtitle to determine whether the allegations in the petition, other than the allegation that the child requires the court's intervention, are true.

(d) "Adult" means an individual who is at least 18 years old.

(e) "Child" means an individual under the age of 18 years.

(f) "Child in need of assistance" means a child who requires court intervention because:

(1) The child has been abused, has been neglected, has a developmental disability, or has a mental

disorder; and

(2) The child's parents, guardian, or custodian are unable or unwilling to give proper care and attention to the child and the child's needs.

(g) "CINA" means a child in need of assistance.

(h) "Commit" means to transfer custody.

(i) "Court" means the circuit court for a county sitting as the juvenile court.

(j) "Custodian" means a person or governmental agency to whom custody of a child has been given by order of court, including a court other than the juvenile court.

(k) "Custody" means the right and obligation, unless otherwise determined by the court, to provide ordinary care for a child and determine placement.

(l) "Developmental disability" means a severe chronic disability of an individual that:

(1) Is attributable to a physical or mental impairment, other than the sole diagnosis of mental illness, or to a combination of mental and physical impairments;

(2) Is likely to continue indefinitely;

(3) Results in an inability to live independently without external support or continuing and regular assistance; and

(4) Reflects the need for a combination and sequence of special, interdisciplinary, or generic care, treatment, or other services that are individually planned and coordinated for the individual.

(m) "Disposition hearing" means a hearing under this subtitle to determine:

(1) Whether a child is in need of assistance; and
(2) If so, the nature of the court's intervention to protect the child's health, safety, and well-being.

(n) "Guardian" means a person to whom guardianship of a child has been given by order of court, including a court other than the juvenile court.

(o) "Guardianship" means an award by a court, including a court other than the juvenile court, of the authority to make ordinary and emergency decisions as to the child's care, welfare, education, physical and mental health, and the right to pursue support.

(p) "Local department" means the local department of social services for the county in which the court is located.

(q) (1) "Mental disorder" means a behavioral or emotional illness that results from a psychiatric or neurological disorder.

(2) "Mental disorder" includes a mental illness that so substantially impairs the mental or emotional functioning of an individual as to make care or treatment necessary or advisable for the welfare of the individual or for the safety of the person or property of another.
(3) "Mental disorder" does not include mental retardation.

(r) "Mental injury" means the observable, identifiable, and substantial impairment of a child's mental or psychological ability to function.

(s) "Neglect" means the leaving of a child unattended or other failure to give proper care and attention to a child by any parent or individual who has permanent or temporary care or custody or responsibility for supervision of the child under circumstances that indicate:

(1) That the child's health or welfare is harmed or placed at substantial risk of harm; or

(2) That the child has suffered mental injury or been placed at substantial risk of mental injury.

(t) "Parent" means a natural or adoptive parent whose parental rights have not been terminated.

(u) (1) "Party" means:

(i) A child who is the subject of a petition;

(ii) The child's parent, guardian, or custodian;

(iii) The petitioner; or

(iv) An adult who is charged under § 3-828 of this subtitle.

(2) "Party" does not include a foster parent.

(v) (1) "Sexual abuse" means an act that involves sexual molestation or sexual exploitation of a child by:

(i) A parent or other individual who has permanent or temporary care or custody or responsibility for supervision of the child; or

(ii) A household or family member.

(2) "Sexual abuse" includes:

(i) Incest;

(ii) Rape;

(iii) Sexual offense in any degree;

(iv) Sodomy; and

(v) Unnatural or perverted sexual practices.

(w) "Shelter care" means a temporary placement of a child outside of the home at any time before disposition.

(x) "Shelter care hearing" means a hearing held before disposition to determine whether the temporary placement of the child outside of the home is warranted.

(y) "TPR proceeding" means a proceeding to terminate parental rights.

(z) "Voluntary placement" means a placement in accordance with § 5- 525(a)(1)(i) or (iii) of the Family Law Article.

(aa) "Voluntary placement hearing" means a hearing to obtain a judicial determination as to whether continuing a voluntary placement is in the best interests of the child.

**§ 3-802. Purposes**

(a) The purposes of this subtitle are:

(1) To provide for the care, protection, safety, and mental and physical development of any child coming within the provisions of this subtitle;

(2) To provide for a program of services and treatment consistent with the child's best interests and the promotion of the public interest;

(3) To conserve and strengthen the child's family ties and to separate a child from the child's parents only when necessary for the child's welfare;

(4) To hold parents of children found to be in need of assistance responsible for remedying the

circumstances that required the court's intervention;
(5) Except as otherwise provided by law, to hold the local department of social services responsible for providing services to assist the parents with remedying the circumstances that required the court's intervention;
(6) If necessary to remove a child from the child's home, to secure for the child custody, care, and discipline as nearly as possible equivalent to that which the child's parents should have given;
(7) To achieve a timely, permanent placement for the child consistent with the child's best interests; and
(8) To provide judicial procedures for carrying out the provisions of this subtitle.

(b) This subtitle shall be construed liberally to effectuate these purposes.

**§ 3-803. Exclusive jurisdiction; concurrent jurisdiction**

(a) In addition to the jurisdiction specified in Subtitle 8A of this title, the court has exclusive original jurisdiction over:
(1) Voluntary placement hearings;
(2) Proceedings arising from a petition alleging that a child is a CINA;
(3) Proceedings arising under the Interstate Compact on the Placement of Children;
(4) Proceedings to terminate parental rights after a CINA proceeding;
(5) Guardianship review proceedings after a TPR proceeding; and
(6) Adoption proceedings, if any, after a TPR proceeding.

(b) (1) The court has concurrent jurisdiction over:
(i) Custody, visitation, support, and paternity

of a child whom the court finds to be a CINA; and

(ii) Custody of a child alleged to be a CINA under the circumstances described in § 3-819(d) of this subtitle.

(2) During pendency of an action under this subtitle, a party has a continuing duty to advise the court and any other court considering custody, support, visitation, or paternity of a child, of the pendency of any other action concerning the child, whether the action is in this or another state.

(3) (i) The court may decline to exercise jurisdiction under this subsection if there is a proceeding pending in another court of competent jurisdiction.

(ii) If the court and another court both have pending actions involving a child described in paragraph (1) of this subsection, the court shall communicate with the other court expeditiously to determine the more appropriate court to take further action, consistent with the best interest of the child.

(iii) The court shall advise the parties of the decision and the basis for the decision.

(c) (1) The court has concurrent jurisdiction over proceedings against an adult for a violation of § 3-828 of this subtitle.

(2) (i) The court may waive its jurisdiction under this subsection on its own motion or on the motion of any party to the proceeding, if charges against the adult arising from the same incident are pending in the criminal court.

(ii) On motion by the State's Attorney or the adult charged under § 3-828 of this subtitle,

the court shall waive its jurisdiction and the adult shall be tried in the criminal court according to the usual criminal procedure.

(3) The age of the child at the time a petition is filed under § 3-828 of this subtitle controls the determination of jurisdiction under this subsection.

**§ 3-804. Obtaining jurisdiction; termination of jurisdiction**

(a) The court has jurisdiction under this subtitle only if the alleged CINA or child in a voluntary placement is under the age of 18 years when the petition is filed.

(b) If the court obtains jurisdiction over a child, that jurisdiction continues in that case until the child reaches the age of 21 years, unless the court terminates the case.

(c) After the court terminates jurisdiction, a custody order issued by the court in a CINA case:

(1) Remains in effect; and

(2) May be revised or superseded only by another court of competent jurisdiction.

**§ 3-805. Venue**

(a) (1) A petition alleging that a child is a CINA shall be filed in the county where:

(i) The child is residing when the petition is filed; or

(ii) The act on which the petition is based allegedly occurred.

(2) A voluntary placement petition shall be filed in the county where the parent or legal guardian resides.

(b) (1) Whenever a petition is filed other than in the county where the child resides, the court, on its own motion or on motion of a party, may transfer the case at any time to any appropriate county, including a county where:

(i) Another case involving custody, visitation, or support of the child is pending;

(ii) The child resides;

(iii) A parent of the child resides; or

(iv) The court determines it is in the child's best interests for further proceedings concerning the child to take place.

(2)(i) Before the court transfers a case to another court in the State, the court shall communicate with the juvenile judge of the other court or the judge's designee.

(ii) The court shall advise the parties of the decision made to transfer the case and the basis for the decision.

(3) Before the court transfers a case to a court outside the State, the court shall communicate with the other court in accordance with the Maryland Uniform Child Custody Jurisdiction Act.

(4) (i) Within 15 days after the court orders a transfer, the clerk of the sending court shall forward to the receiving court every document on file with the sending court.

(ii) If a case is transferred to another court in this State, the receiving court shall treat the case as if it had been filed with that court initially and shall set hearing dates as close as practicable to those set forth in any pending orders issued by the sending court.

(c) If information about a child is alleged to be available in another jurisdiction in or outside of this State, the court, on its own motion or on motion of a party, may use the provisions of the Maryland Uniform Child Custody Jurisdiction Act to obtain that information.

**§ 3-806. Assignment of judges**

(a)(1) In every county, one or more judges shall be assigned specially to handle cases arising under this subtitle and Subtitle 8A of this title.

(2) The assignment shall be made by the circuit administrative judge, subject to the approval of the Chief Judge of the Court of Appeals.

(3) The judges so assigned are not subject to an automatic regular rotation.

(b) To the extent feasible, the judges assigned under this section shall:

(1) Desire to be so assigned;

(2) Have the temperament necessary to deal properly with the cases and children likely to come before the court; and

(3) Have special experience or training in juvenile causes and the problems of children likely to come before the court.

**§ 3-807. Master for juvenile causes**

(a)(1) The judges of a circuit court may not appoint a master for juvenile causes arising under this subtitle and Subtitle 8A of this title unless the appointment and the appointee are approved by the Chief Judge of the Court of Appeals.

(2) The standards expressed in § 3-806(b) of this subtitle, with respect to the assignment of judges,

are applicable to the appointment of masters.

(3) A master, at the time of appointment and at all times while serving as a master, shall be a member in good standing of the Maryland bar.

(4)(i) In Prince George's County, the judges of the circuit court may not appoint or continue the appointment of masters for juvenile causes, except for the purpose of conducting:

1. Probable cause hearings, detention hearings, arraignments, acceptances of admissions, and restitution hearings in delinquency cases under Subtitle 8A of this title;

2. Shelter care, adjudicatory, and disposition hearings in CINA cases under this subtitle; and

3. Voluntary placement hearings under this subtitle.

(ii) A master in Prince George's County may not conduct:

1. An adjudicatory hearing in delinquency cases under Subtitle 8A of this title, unless the adjudicatory hearing is limited to the acceptance of an admission;

2. A disposition hearing in delinquency cases under Subtitle 8A of this title; or

3. A peace order proceeding under Subtitle 8A of this title.

(b)(1) A master appointed for juvenile causes may conduct hearings.

(2) Each proceeding shall be recorded, and the master shall make findings of fact, conclusions of

law, and recommendations as to an appropriate order.

(3) The proposals and recommendations shall be in writing, and, within 10 days after the hearing, the original shall be filed with the court and a copy served on each party to the proceeding.

(c)(1) Any party, in accordance with the Maryland Rules, may file written exceptions to any or all of the master's findings, conclusions, and recommendations, but shall specify those items to which the party objects.

(2) The party who files exceptions may elect a hearing de novo or a hearing on the record before the court unless the party is the State in proceedings involving juvenile delinquency under Subtitle 8A of this title.

(3) If the State is the excepting party in proceedings involving juvenile delinquency, the hearing shall be on the record, supplemented by additional evidence as the judge considers relevant and to which the parties raise no objection.

(4) In either case, the hearing shall be limited to those matters to which exceptions have been taken.

(d)(1) The proposals and recommendations of a master for juvenile causes do not constitute orders or final action of the court.

(2) The proposals and recommendations shall be promptly reviewed by the court, and, in the absence of timely and proper exceptions, they may be adopted by the court and appropriate orders entered based on them.

(3) Detention, community detention, or shelter care may be ordered by a master pending court review of

the master's findings, conclusions, and recommendations.

(e) If the court, on its own motion and in the absence of timely and proper exceptions, decides not to adopt the master's findings, conclusions, and recommendations, or any of them, the court shall conduct a de novo hearing, unless all parties and the court agree to a hearing on the record.

**§ 3-808. No jury trial**

The court shall try cases under this subtitle without a jury.

**§ 3-809. Decision to file petition**

(a) On receipt of a complaint from a person or agency having knowledge of facts which may cause a child to be subject to the jurisdiction of the court under this subtitle, the local department shall file a petition under this subtitle if it concludes that the court has jurisdiction over the matter and that the filing of a petition is in the best interests of the child.

(b) Within 5 days after reaching a decision not to file a petition, the local department shall inform in writing the following persons of the decision and the reasons for the decision:

(1) A child over the age of 10 who would have been the subject of the petition, if appropriate;

(2) The parent, guardian, or custodian of the child who would have been the subject of the petition; and

(3) Each person or agency that requested that a petition be filed.

(c) Within 15 days after notice that a local department has decided not to file a petition, the person or agency that requested that a petition be filed may request review by the Secretary of Human Resources.

(d) Within 15 days after a request for review is received, the Secretary of Human Resources or the Secretary's designee, in consultation with the director of the local department, shall review the report and may direct the local department to file a petition within 5 days.

(e) If the Secretary of Human Resources or the Secretary's designee refuses to direct the local department to file a petition, the person or agency that filed the complaint under subsection (a) of this section or caused it to be filed may file the petition.

**§ 3-810. Procedure**

(a) Except as otherwise provided in this subtitle, the Maryland Rules govern the format of a petition and of other pleadings and the procedures to be followed by the court and parties under this subtitle.

(b)(1) In any proceeding in which a child is alleged to be in need of assistance or in any voluntary placement hearing, the court may exclude the general public from a hearing and admit only those persons having a direct interest in the proceeding and their representatives.

(2) The court shall exclude the general public from a hearing where the proceedings involve discussion of confidential information from the child abuse and neglect report and record, or any information obtained from the child welfare agency concerning a child or family who is receiving Title IV-B child

welfare services or Title IV-E foster care or adoption assistance.

(c) The clerk of the court shall make a separate file for each case.

**§ 3-811. Content of petition**

(a)(1) A CINA petition under this subtitle shall allege that a child is in need of assistance and shall set forth in clear and simple language the facts supporting that allegation.

(2) A voluntary placement petition under this subtitle shall allege that continuation of a voluntary placement is in the best interests of the child and shall set forth in clear and simple language the facts supporting that allegation.

(b) A separate petition shall be filed as to each child.

**§ 3-812. When reasonable efforts to reunify child not required**

(a)(1) In this section the following words have the meanings indicated, unless the context of their use indicates otherwise.

(2) "Crime of violence" has the meaning stated in § 14-101 of the Criminal Law Article.

(3) "Torture" means to cause intense pain to body or mind for purposes of punishment or extraction of information or for sadistic purposes.

(b) In a petition under this subtitle, a local department may ask the court to find that reasonable efforts to reunify a child with the child's natural parent or guardian are not required if the local department concludes that a natural parent or guardian has:

(1) Subjected the child to:

(i) Chronic abuse;

(ii) Chronic and life-threatening neglect;

(iii) Sexual abuse; or

(iv) Torture;

(2) Been convicted:

(i) In this State of a crime of violence against the child, the other natural parent of the child, another child of the natural parent, or any individual who resides in the household of the natural parent;

(ii) In any state or in any court of the United States of a crime that would be a crime of violence if committed in this State, against the child, the other natural parent of the child, another child of the natural parent, or any individual who resides in the household of the natural parent; or

(iii) Of aiding or abetting, conspiring, or soliciting to commit a crime described in subitem (i) or (ii) of this item; or

(3) Involuntarily lost parental rights of a sibling of a child.

(c) If the local department determines after the initial petition is filed that any of the circumstances specified in subsection (b) of this section exists, the local department may immediately request the court to find that reasonable efforts to reunify the child with the child's parent or guardian are not required.

(d) If the court finds by clear and convincing evidence that any of the circumstances specified in subsection (b) of this section exists, the court shall waive the requirement that

reasonable efforts be made to reunify the child with the child's natural parent or guardian.

(e) If the court finds that reasonable efforts are not required, the local department shall:

(1) Request that a permanency planning hearing be held in accordance with § 3-823 of this subtitle within 30 days after the court makes the finding; and

(2) Make reasonable efforts to place the child in a timely manner in accordance with the permanency plan and complete the steps necessary to finalize the permanent placement of the child.

**§ 3-813. Assistance of counsel**

(a) Except as provided in subsections (b) and (c) of this section, a party is entitled to the assistance of counsel at every stage of any proceeding under this subtitle.

(b) Except for the local department and the child who is the subject of the petition, a party is not entitled to the assistance of counsel at State expense unless the party is:

(1) Indigent; or

(2) Otherwise not represented and:

(i) Under the age of 18 years; or

(ii) Incompetent by reason of mental disability.

(c) The Office of the Public Defender may not represent a party in a CINA proceeding unless the party:

(1) Is the parent or guardian of the alleged CINA;

(2) Applies to the Office of the Public Defender requesting legal representation by the Public Defender in the proceeding; and

(3) Is financially eligible for the services of the

Public Defender.

(d)(1) A child who is the subject of a CINA petition shall be represented by counsel.

(2) Unless the court finds that it would not be in the best interests of the child, the court shall:

(i) Appoint an attorney with whom the Department of Human Resources has contracted to provide those services, in accordance with the terms of the contract; and

(ii) If another attorney has previously been appointed, strike the appearance of that attorney.

(e) In addition to, but not instead of, the appointment of an attorney under this section, the court, in any action, may appoint an individual provided by a Court-Appointed Special Advocate Program created under § 3-830 of this subtitle.

(f) The court may assess against any party reasonable compensation for the services of an attorney appointed to represent a child in an action under this subtitle.

**§ 3-814. Taking child into custody**

(a) A child may be taken into custody under this subtitle by any of the following methods:

(1) In accordance with an order of the court;

(2) In accordance with § 5-709 of the Family Law Article; or

(3) By a law enforcement officer if the officer has reasonable grounds to believe that the child is in immediate danger from the child's surroundings and that the child's removal is necessary for the child's

protection.

(b) Whenever a law enforcement officer takes a child into custody under this section, the officer shall:

(1) Immediately notify the child's parent, guardian, or custodian;

(2) Immediately notify the local department; and

(3) Keep custody only until the local department either takes custody under § 3-815 of this subtitle or authorizes release of the child unless the officer determines that it is safe to return the child to the child's parent, custodian, or guardian.

(c)(1) If a parent, guardian, or custodian fails to bring the child before the court when requested, the court may issue a writ of attachment directing that the child be taken into custody and brought before the court.

(2) The court may proceed against the parent, guardian, or custodian for contempt.

**§ 3-815. Shelter care**

(a) In accordance with regulations adopted by the Department of Human Resources, a local department may authorize shelter care for a child who may be in need of assistance and has been taken into custody under this subtitle.

(b) A local department may place a child in emergency shelter care before a hearing if:

(1) Placement is required to protect the child from serious immediate danger;

(2) There is no parent, guardian, custodian, or other person able to provide supervision; and

(3) (i)1. The child's continued placement in the child's home is contrary to the welfare of the

child; and

2. Because of an alleged emergency situation, removal from the home is reasonable under the circumstances to provide for the safety of the child; or

(ii)1. Reasonable but unsuccessful efforts have been made to prevent or eliminate the need for removal from the child's home; and

2. As appropriate, reasonable efforts are being made to return the child to the child's home.

(c)(1) Whenever a child is not returned to the child's parent, guardian, or custodian, the local department shall immediately file a petition to authorize continued shelter care.

(2)(i) The court shall hold a shelter care hearing on the petition before disposition to determine whether the temporary placement of the child outside of the home is warranted.

(ii) Unless extended on good cause shown, a shelter care hearing shall be held not later than the next day on which the circuit court is in session.

(3) If the child's parents, guardian, or custodian can be located, reasonable notice, oral or written, stating the time, place, and purpose of the shelter care hearing shall be given.

(4) A court may not order shelter care for more than 30 days except that shelter care may be extended for up to an additional 30 days if the court finds after a hearing held as part of an adjudication that continued shelter care is needed to provide for the

safety of the child.

(d) A court may continue shelter care beyond emergency shelter care only if the court finds that:

(1) Return of the child to the child's home is contrary to the safety and welfare of the child; and

(2) (i) Removal of the child from the child's home is necessary due to an alleged emergency situation and in order to provide for the safety of the child; or

(ii) Reasonable but unsuccessful efforts were made to prevent or eliminate the need for removal of the child from the home.

(e)(1) If the court continues shelter care on the basis of an alleged emergency, the court shall assess whether the absence of efforts to prevent removal was reasonable.

(2) If the court finds that the absence of efforts to prevent removal was not reasonable, the court shall make a written determination so stating.

(3) The court shall make a written determination as to whether reasonable efforts are being made to make it possible to return the child to the child's home or whether the absence of such efforts is reasonable.

(f)(1) An alleged CINA may not be placed in:

(i) Detention, as defined in § 3-8A-01 of this title; or

(ii) A mental health facility, unless committed involuntarily in accordance with §§ 10-613 through 10-619 of the Health - General Article.

(2)(i) If the child is alleged to be in need of

assistance because of a mental disorder or a developmental disability, the child may be placed in a shelter care facility maintained or licensed by the Department of Health and Mental Hygiene or, if no such facility is available, in a private home or shelter care facility approved by the court.

(ii) If the child is alleged to be in need of assistance for any other reason, the child may be placed in a shelter care facility maintained or approved by the Social Services Administration or in a private home or shelter care facility approved by the court.

(3) An alleged CINA may not be placed in a shelter care facility that is not operating in compliance with applicable State licensing laws.

(4) The Secretary of Human Resources, the Secretary of Juvenile Services, the Secretary of Health and Mental Hygiene, the State Superintendent of Schools, and the Special Secretary for Children, Youth, and Families, when appropriate, shall jointly adopt regulations to ensure that any child placed in shelter care in accordance with a petition filed under this section is provided appropriate services, including:

(i) Health care services;

(ii) Mental health care services;

(iii) Counseling services;

(iv) Education services;

(v) Social work services;

(vi) Drug and alcohol abuse assessment or treatment services; and

(vii) Visitation with siblings and biological family.

(5) In addition to any other provision, the regulations shall require the local department:

(i) Within 45 days of placement of a child in a shelter care facility, to develop a plan to assess the child's treatment needs; and

(ii) To submit the plan to all parties to the petition and their counsel.

**§ 3-816. Case study**

(a) After a petition is filed under this subtitle, the court may order the local department or another qualified agency to make or arrange for a study concerning the child, the child's family, the child's environment, and other matters relevant to the disposition of the case.

(b)(1) As part of a study under this section, the court may order that the child or any parent, guardian, or custodian be examined at a suitable place by a physician, psychiatrist, psychologist, or other professionally qualified person.

(2)(i) The court may not order an inpatient evaluation unless, after a hearing, the court finds that an inpatient evaluation is necessary and there are no less restrictive means to obtain an evaluation.

(ii) Placement in an inpatient facility may not exceed 21 days unless the court finds good cause.

(c)(1) The report of a study under this section is admissible as evidence at a disposition hearing but not at an adjudicatory hearing.

(2) The attorney for each party has the right to receive the report at least 5 days before its presentation to the court, to challenge or impeach

its findings and to present appropriate evidence with respect to it.

(3) The time requirement specified in paragraph (2) of this subsection does not apply to an emergency dispositional review hearing held in accordance with § 3-820 of this subtitle.

**§ 3-817. Adjudication hearing**

(a) After a CINA petition is filed under this subtitle, the court shall hold an adjudicatory hearing.

(b) The rules of evidence under Title 5 of the Maryland Rules shall apply at an adjudicatory hearing.

(c) The allegations in a petition under this subtitle shall be proved by a preponderance of the evidence.

**§ 3-818. Presumption of lack of proper care and attention**

Within 1 year after a child's birth, there is a presumption that a child is not receiving proper care and attention from the mother for purposes of § 3- 801(f)(2) of this subtitle if:

(1)(i) The child was born exposed to cocaine, heroin, or a derivative of cocaine or heroin as evidenced by any appropriate tests of the mother or child; or

(ii) Upon admission to a hospital for delivery of the child, the mother tested positive for cocaine, heroin, or a derivative of cocaine or heroin as evidenced by any appropriate toxicology test; and

(2) Drug treatment is made available to the mother and the mother refuses the recommended level of drug treatment, or does not successfully complete

the recommended level of drug treatment.

**§ 3-819. Disposition hearing**

(a)(1) Unless a CINA petition under this subtitle is dismissed, the court shall hold a separate disposition hearing after an adjudicatory hearing to determine whether the child is a CINA.

(2) The disposition hearing shall be held on the same day as the adjudicatory hearing unless on its own motion or motion of a party, the court finds that there is good cause to delay the disposition hearing to a later day.

(3) If the court delays a disposition hearing, it shall be held no later than 30 days after the conclusion of the adjudicatory hearing unless good cause is shown.

(b) In making a disposition on a CINA petition under this subtitle, the court shall:

(1) Find that the child is not in need of assistance and, except as provided in subsection (e) of this section, dismiss the case; or

(2) Find that the child is in need of assistance and:

(i) Not change the child's custody status; or

(ii) Commit the child to the custody of:

1. A parent, relative, or other individual on terms the court considers appropriate; or

2. A local department, the Department of Health and Mental Hygiene, or both, on terms that the court considers appropriate, including designation of the type of

facility where the child is to be placed.

(c) In addition to any action under subsection (b)(2) of this section, the court may:

(1)(i) Place a child under the protective supervision of the local department on terms the court considers appropriate;

(ii) Grant limited guardianship to the department or an individual or both for specific purposes including medical and educational purposes or for other appropriate services if a parent is unavailable, unwilling, or unable to consent to services that are in the best interest of the child; or

(iii) Order the child and the child's parent, guardian, or custodian to participate in rehabilitative services that are in the best interest of the child and family; and

(2) Determine custody, visitation, support, or paternity of a child in accordance with § 3-803(b) of this subtitle.

(d) If guardianship of a child is awarded to the local department under this subtitle, the local department shall notify the parents of the child and their attorneys as soon as practicable of any emergency decision made by the guardian with respect to the child under § 3-801(o) of this subtitle.

(e) If the allegations in the petition are sustained against only one parent of a child, and there is another parent available who is able and willing to care for the child, the court may not find that the child is a child in need of assistance, but, before dismissing the case, the court may

award custody to the other parent.

(f) If the disposition removes a child from the child's home, the order shall:

(1) Set forth specific findings of fact as to the circumstances that caused the need for the removal; and

(2) Inform the parents, custodian, or guardian, if any, that the person or agency to which the child is committed may change the permanency plan of reunification to another permanency plan, which may include the filing of a petition for termination of parental rights if the parents:

(i) Have not made significant progress to remedy the circumstances that caused the need for the removal as specified in the court order; and

(ii) Are unwilling or unable to give the child proper care and attention within a reasonable period of time.

(g) A guardian appointed under this section has no control over the property of the child unless the court expressly grants that authority.

(h) The court may not commit a child for inpatient care and treatment in a psychiatric facility unless the court finds on the record based on clear and convincing evidence that:

(1) The child has a mental disorder;

(2) The child needs inpatient medical care or treatment for the protection of the child or others;

(3) The child is unable or unwilling to be voluntarily admitted to such facility; and

(4) There is no less restrictive form of intervention

available that is consistent with the child's condition and welfare.

(i) The court may not commit a child for inpatient care and treatment in a facility for the developmentally disabled unless the court finds on the record based on clear and convincing evidence that:

(1) The child is developmentally disabled;

(2) The condition is of such a nature that for the adequate care or protection of the child or others, the child needs in-residence care ortreatment; and

(3) There is no less restrictive form of care and treatment available that is consistent with the child's welfare and safety.

(j)(1)(i) Each commitment order issued under subsection (h) or (i) of this section shall require the custodian to file progress reports with the court at intervals no greater than every 6 months during the life of the order.

(ii) The custodian shall provide each party or attorney of record with a copy of each report, which shall be considered at the next scheduled hearing.

(iii) After the first 6 months of the commitment and at 6-month intervals thereafter, on the request of any party, the custodian, or the facility, the court shall hold a hearing to determine whether the standards specified in subsection (h) or (i) of this section continue to be met.

(2)(i) If an individualized treatment plan developed under § 10-706 of the Health - General Article recommends that a child no longer meets the standards specified in subsection (h) of this section,

the court shall grant a hearing to review the commitment order.

(ii) The court may grant a hearing at any other time to determine whether the standards specified in subsection (h) of this section continue to be met.

(3)(i) If an individualized plan of habilitation developed under § 7-1006 of the Health - General Article recommends that a child no longer meets the standards specified in subsection (i) of this section, the court shall grant a hearing to review the commitment order.

(ii) The court may grant a hearing at any other time to determine whether the standards specified in subsection (i) of this section continue to be met.

(k) An order vesting legal custody of a child in a person or agency is effective for an indeterminate period of time, but is not effective after the child reaches the age of 21.

(l) After giving the parent a reasonable opportunity to be heard, and determining the income of the parent, the court may order either parent or both parents to pay a sum in the amount the court directs to cover wholly or partly the support of the child under this subtitle.

**§ 3-819.1. Voluntary placement hearing**

(a) Within 30 days after a voluntary placement petition is filed, the court shall hold a voluntary placement hearing and shall make findings as to:

(1) Whether continuation of the placement is in the child's best interests; and

(2) Whether reasonable efforts have been made to reunify the child with the family or place the child

in a timely manner in accordance with the child's permanency plan.

(b) In making a disposition on a voluntary placement petition under this section, the court shall:

(1) Order the child's voluntary placement to be terminated and the child returned to the child's home and provided with available services and support needed for the child to remain in the home;
(2) Order the child's voluntary placement to continue if the local department and the child's parent or guardian continue to agree to the voluntary placement;
(3) Subject to the provisions of § 3-819(h), (i), and (j) of this subtitle, order an amendment to the voluntary placement agreement to address the needs of the child; or
(4) If necessary to ensure the care, protection, safety, and mental and physical development of the child, order the local department to file a CINA petition.

**§ 3-820. Removal of child from placement**

(a) After a CINA disposition, when the court has ordered a specific placement of a child, a local department may remove the child from that placement prior to a hearing only if:

(1) Removal is required to protect the child from serious immediate danger;
(2) The child's continued placement in the court-ordered placement is contrary to the welfare of the child; or

(3) The person or agency with whom the child is placed has requested the immediate removal of the child.

(b)(1) Before removal or, if not possible, immediately after removal, the local department shall notify all parties, counsel, and the court of the removal of the child.

(2) The local department shall provide the address and phone number of the child's new placement to the child's counsel.

(c)(1) If the child is not returned to the court-ordered placement, the local department shall immediately file a motion to authorize the removal of the child and the child's new placement.

(2) The motion shall set forth the facts on which the department relied in removing the child and the identity of any witnesses.

(d)(1) The court shall hold an emergency review placement hearing on the motion not later than the next day on which the circuit court is in session.

(2) All parties shall be given reasonable notice of the hearing.

(e) At the emergency review placement hearing, the court's decision to reject or to ratify the local department's removal of the child shall be based upon such evidence as would be sufficient under § 3-815(d) of this subtitle to order shelter care.

(f)(1) Unless all parties agree to the court's order at the emergency review placement hearing, the court, at that hearing, shall schedule a regular review hearing within 30

days after the emergency review hearing for a full hearing on the merits of the local department's action.

(2) At the full hearing on the merits, the rules of evidence under Title 5 of the Maryland Rules shall apply.

(3) The hearing may be postponed by agreement of the parties or for good cause shown.

**§ 3-821. Orders directing, restraining, or controlling conduct**

(a) The court, on its own motion or on application of a party, may issue an appropriate order directing, restraining, or otherwise controlling the conduct of a person who is properly before the court, if the court finds that the conduct:

(1) Is or may be detrimental or harmful to a child over whom the court has jurisdiction;

(2) Will tend to defeat the execution of an order or disposition made or to be made under this subtitle; or

(3) Will assist in the rehabilitation of or is necessary for the welfare of the child.

(b) Subsection (a) of this section shall apply to a person not a party to the petition if the person is given:

(1) Notice of the proposed order controlling the person's conduct; and

(2) The opportunity to contest the entry of the proposed order.

(c) An order issued under this section is enforceable under Title 15, Chapter 200 of the Maryland Rules.

**§ 3-822. Addresses of parents; child support; paternity; use of evidence and findings**

(a)(1) At each CINA hearing, the court shall inquire into, and make findings of fact on the record as to, the identity and current address of each parent of each child before the court.

(2) In carrying out paragraph (1) of this subsection, the court shall:

(i) Inform all parties present of their continuing obligation to assist the court in identifying and locating each parent of each child;

(ii) Inform the parents present of their continuing obligation to keep the clerk of the court apprised of their current address;

(iii) Inform the parents present of available means to establish paternity, if not yet established; and

(iv) If appropriate, refer the parents to the appropriate support enforcement agency to establish paternity and support.

(b) Each parent of a child who is the subject of a CINA proceeding shall notify the court and the local department of all changes in the parent's address.

(c) The clerk of the court shall keep a listing of every address provided by a parent of a child who is the subject of a CINA proceeding.

(d) On request of a local department, the clerk's office shall disclose to the local department all addresses listed by a parent of a CINA within the preceding 9 months, for the purpose of attempting notification of a petition for

guardianship with the right to consent to adoption or long-term care short of adoption.

(e) The court may:

(1) Order a parent or putative parent to:

(i) Apply for child support services with the appropriate support enforcement agency; and

(ii) Cooperate with the appropriate support enforcement agency to establish paternity and child support; and

(2) Make a finding of paternity in accordance with Title 5, Subtitle 10, Part VI of the Family Law Article.

(f) Any court may consider evidence taken and findings made on the record in a CINA hearing and in a paternity, custody, child support, or guardianship proceeding regarding that child or a sibling of a child.

**§ 3-823. Permanent placement**

(a) In this section, "out-of-home placement" has the meaning stated in § 5- 501 of the Family Law Article.

(b)(1) The court shall hold a permanency planning hearing to determine the permanency plan for a child:

(i) No later than 11 months after a child committed under § 3-819 of this subtitle or continued in a voluntary placement under § 3-819.1(b) of this subtitle enters an out-of-home placement; or

(ii) Within 30 days after the court finds that reasonable efforts to reunify a child with the

child's parent or guardian are not required based on a finding that a circumstance enumerated in § 3-812 of this subtitle has occurred.

(2) For purposes of this section, a child shall be considered to have entered an out-of-home placement 30 days after the child is placed into an out-of-home placement.

(3) If all parties agree, a permanency planning hearing may be held on the same day as the reasonable efforts hearing.

(c)(1) On the written request of a party or on its own motion, the court may schedule a hearing at any earlier time to determine a permanency plan or to review the implementation of a permanency plan for any child committed under § 3-819 of this subtitle.

(2) A written request for review shall state the reason for the request and each issue to be raised.

(d) At least 10 days before the permanency planning hearing, the local department shall provide all parties and the court with a copy of the local department's permanency plan for the child.

(e) At a permanency planning hearing, the court shall:

(1) Determine the child's permanency plan, which may be:

(i) Reunification with the parent or guardian;

(ii) Placement with a relative for:

1. Adoption; or

2. Custody and guardianship;

(iii)Adoption by a nonrelative;

(iv) Guardianship by a nonrelative;

(v) Continuation in a specified placement on a permanent basis because of the child's special needs or circumstances;

(vi) Continuation in placement for a specified period because of the child's special needs or circumstances; or

(vii) Independent living; and

(2) For a child who has attained the age of 16, determine the services needed to assist the child to make the transition from placement to independent living.

(f) The court may not order a child to be continued in a placement under subsection (e)(1)(v) or (vi) of this section unless the court finds that the person or agency to which the child is committed has documented a compelling reason for determining that it would not be in the best interest of the child to:

(1) Return home;

(2) Be referred for termination of parental rights; or

(3) Be placed for adoption or guardianship with a specified and appropriate relative or legal guardian willing to care for the child.

(g) In the case of a child for whom the court determines that the plan should be changed to adoption under subsection (e)(1)(iii) of this section, the court shall:

(1) Order the local department to file a petition for guardianship in accordance with Title 5, Subtitle 3 of the Family Law Article within 30 days or, if the local department does not support the plan, within 60 days; and

(2) Schedule a TPR hearing instead of the next 6-month review hearing.

(h)(1)(i) Except as provided in subparagraphs (ii) and (iii) of this paragraph, the court shall conduct a hearing to review the permanency plan at least every 6 months until commitment is rescinded or a voluntary placement is terminated.

(ii) The court shall conduct a review hearing every 12 months after the court determines that the child shall be continued in out-of-home placement with a specific caregiver who agrees to care for the child on a permanent basis.

(iii)1. Unless the court finds good cause, a case shall be terminated after the court grants custody and guardianship of the child to a relative or other individual.

2. If the court finds good cause not to terminate a case, the court shall conduct a review hearing every 12 months until the case is terminated.

(2) At the review hearing, the court shall:

(i) Determine the continuing necessity for and appropriateness of the commitment;

(ii) Determine and document in its order whether reasonable efforts have been made to finalize the permanency plan that is in effect;

(iii) Determine the extent of progress that has been made toward alleviating or mitigating the causes necessitating commitment;

(iv) Project a reasonable date by which a child in placement may be returned home, placed in a preadoptive home, or placed under a legal guardianship;

(v) Evaluate the safety of the child and take necessary measures to protect the child; and

(vi) Change the permanency plan if a change

in the permanency plan would be in the child's best interest.

(3) Every reasonable effort shall be made to effectuate a permanent placement for the child within 24 months after the date of initial placement.

(i)(1) In this subsection, "preadoptive parent" means an individual whom a child placement agency, as defined in § 5-301 of the Family Law Article, approves to adopt a child who has been placed in the individual's home for adoption before the final decree of adoption.

(2) If practicable, the local department shall give at least 7 days' notice before any hearing conducted under this section to the child's foster parent, preadoptive parent, or relative providing care for the child.

(3) The foster parent, preadoptive parent, relative, or an attorney for the foster parent, preadoptive parent, or relative shall be given an opportunity to be heard at the hearing.

(4) The foster parent, preadoptive parent, relative, or attorney may not be considered to be a party solely on the basis of the right to notice and opportunity to be heard provided under this subsection.

(j) At a review hearing under this section, the court shall consider any written report of a local out-of-home placement review board required under § 5-545 of the Family Law Article.

**§ 3-824. Petition for emergency medical or psychiatric treatment**

(a) The court shall hear and rule on a petition seeking an

order for emergency medical or psychiatric treatment on an expedited basis.

(b)(1) The court may order emergency medical, dental, or surgical treatment of a child alleged to have a condition or illness that, in the opinion of a licensed physician or dentist, as the case may be, requires immediate treatment, if the child's parent, guardian, or custodian is not available or, without good cause, refuses to consent to the treatment.

(2) A child may be placed in an emergency facility on an emergency basis under Title 10, Subtitle 6, Part IV of the Health - General Article.

(c) The court shall apply the factors specified in § 13-711(b) of the Estates and Trusts Article, to the extent relevant, when deciding whether to withhold or withdraw a life-sustaining procedure, as defined in § 13-711(c) of the Estates and Trusts Article.

**§ 3-825. Restrictions on place of detention**

(a) A court may not commit a child who is subject to this subtitle to, and the child may not be detained at or transferred to, a correctional facility, as defined in § 1-101 of the Correctional Services Article.

(b) A child who is not a delinquent child, as defined in § 3-8A-01 of this title, may not be committed or transferred to a facility used for the confinement of delinquent children.

(c) Unless an individualized treatment plan developed under § 10-706 of the Health - General Article indicates otherwise, a child may not be:

(1) Committed or transferred to any public or private facility or institution unless the child is placed in accommodations that are separate from

adults who are confined to that facility or institution; or

(2) Treated in any group with adults.

**§ 3-826. Reports**

(a)(1) Unless the court directs otherwise, a local department shall provide all parties with a written report at least 10 days before any scheduled disposition, permanency planning, or review hearing under § 3-819 or § 3- 823 of this subtitle.

(2) The time requirements specified in paragraph (1) of this subsection do not apply to an emergency review placement hearing under § 3-820 of this subtitle.

(b) If a child is committed to a person or agency under this subtitle, the court may order the custodian to file periodic written progress reports, with copies sent to all parties.

**§ 3-827. Court records**

(a)(1) All court records under this subtitle pertaining to a child shall be confidential and their contents may not be divulged, by subpoena or otherwise, except by order of the court on good cause shown.

(2) This subsection does not prohibit review of a court record by:

(i) Personnel of the court;
(ii) A party;
(iii) Counsel for a party;
(iv) A Court-Appointed Special Advocate for the child; or

(v) Authorized personnel of the Social Services Administration and local departments in order to conduct a child abuse or neglect investigation or to comply with requirements imposed under Title IV-E of the Social Security Act.

(3) Information obtained from a court record is subject to the provisions of Article 88A, § 6 of the Code.

(b)(1) On its own motion or on petition, and for good cause shown, the court:

(i) May order the court records of a child sealed; and

(ii) Shall order them sealed after the child has reached the age of 21.

(2) If sealed, the court records of a child may not be opened, for any purpose, except by order of the court on good cause shown.

**§ 3-828. Liability for rendering child in need of assistance**

(a) An adult may not wilfully contribute to, encourage, cause or tend to cause any act, omission, or condition that renders a child in need of assistance.

(b) A person may be convicted under this section even if the child is not adjudicated a CINA.

(c) An adult who violates this section is guilty of a misdemeanor and on conviction is subject to a fine not exceeding $2,500 or imprisonment not exceeding 3 years or both.

(d) A petition alleging a violation of this section shall be prepared and filed by the State's Attorney.

(e) If an adult is charged under this section, the allegations shall be proved beyond a reasonable doubt.

**§ 3-829. Juvenile court committee**

A governing body of a county may create a juvenile court committee to serve as an advisory body to the court for the county and shall determine the composition and members of the committee.

**§ 3-830. Special advocates**

(a)(1) In this section the following words have the meanings indicated.

(2) "Advocate" or "C.A.S.A." means a Court-Appointed Special Advocate.

(3) "Program" means a Court-Appointed Special Advocate service that is created in a county with the support of the court for that county to provide trained volunteers whom the court may appoint to:

(i) Provide the court with background information to aid it in making decisions in the child's best interest; and

(ii) Ensure that the child is provided appropriate case planning and services.

(b)(1) There is a Court-Appointed Special Advocate Program.

(2) The purpose of the Program is to provide volunteers whose primary purpose is to ensure that children who are the subject of a CINA proceeding

are provided with appropriate service and case planning that is in their best interest.

(3) The Administrative Office of the Courts:

(i) Shall administer the Program;

(ii) Shall report annually to the Chief Judge of the Court of Appeals and, subject to § 2-1246 of the State Government Article, to the General Assembly regarding the operation of the Program; and

(iii) May adopt ~~r~~ules governing the implementation and operation of the Program including funding, training, selection, and supervision of volunteers.

(c) The Governor may include funds in the budget to carry out the provisions of this section.

(d) An advocate or a member of the administrative staff of the Program is not liable for an act or omission in providing services or performing a duty on behalf of the Program, unless the act or omission constitutes reckless, willful, or wanton misconduct or intentionally tortious conduct.

**Excerpts: Transcript of June 5, 2002 Hearing**
**Circuit Court for Baltimore City**
**Division for Juvenile Causes**
**Pages H-8, H-11, H-12**
**Findings and Ruling of the Circuit Court**
(Sup. Ct. R. 14(g)(i))

Page H-8

THE COURT: She knew where he was ten months ago. Now that question was asked and she will not reveal where he was ten months ago based on her Fifth Amendment privilege. And the problem that I have is if she was willing to tell [where] he was ten months ago then there would have been an attempt to purge but there has been no attempt to purge.

* * *

Page H-11

THE COURT: She hasn't answered the question. And 9unintelligible0 where the child is and she certainly knew where he was ten months ago. The child is committed to the Department of Social Services and she took him away from the Department of Social Services.

* * *

THE COURT: The court allowed her to have him examined by a medical doctor. You were here for that.

* * *

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THE COURT: She has not purged herself of the civil contempt and she will be returned to the jail.

**Excerpt: Transcript of June 5, 2002 Hearing**
**Circuit Court for Baltimore City**
**Division for Juvenile Causes**
**Pages H-6 to H-7**
**Issue Raised Below**
(Sup. Ct. R. 14(g)(i))

CROSS-EXAMINATION

BY [BCDSS ATTORNEY]:

Q Ms. B., you say you haven't seen Ariel in about ten months?

A Yes.

Q Where were you when you last saw him ten months ago?

A I have to plead the [F]ifth on that.

Q I can't hear you.

A I have to plead the Fifth Amendment because I have a criminal case in Carroll County.

Q I can't hear you.

A I cannot answer that at this time. I have a criminal case. I take the Fifth Amendment. I have a case pending in Carroll County.

Q Okay. So your answer is that you take the Fifth Amendment; right? But the last time you saw him was about ten months ago?

A About that, maybe.

BY [BCDSS ATTORNEY]: Again, Your Honor, I would ask the court to instruct the witness to answer because again I cite the case of Booknight (phonetic)

versus Maryland that in this situation Ms. B. has no Fifth Amendment right to finding the child and the child's well-being and safety outweighs any Fifth Amendment right she may have.

[MS. B.'S ATTORNEY]: Your Honor, I would respectfully say that [BCDSS Attorney] is incorrect. This is not a Booknight (phonetic) case. . . .

(3)

SUPREME COURT, U.S.
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No. 04-1054

IN THE
# Supreme Court of the United States

BALTIMORE CITY DEPARTMENT OF SOCIAL SERVICES,
*Petitioner.*

v.

TERESA B.,
*Respondent.*

On Petition For A Writ Of Certiorari
To The Court Of Appeals Of Maryland

## REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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## REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

## REPLY ARGUMENT

The arguments raised by the respondent, Teresa B., do not warrant denial of the petition because this case presents a live controversy involving an important question of federal constitutional law, which has yet to be answered by this Court but has led to different results in States where the issue has arisen.

**A. This Case Satisfies The Justiciability Requirements For An Appeal Arising From A State Appellate Court Under *ASARCO, Inc. v. Kadish*, 490 U.S. 605 (1989), And Is Not Moot.**

Contrary to the respondent's suggestion, this case continues to present a live controversy that is not moot.

**1. This Is A Live Justiciable Case Or Controversy.**

As this Court has held, a case that arises from a State appellate court decision on a question of federal law "constitutes a cognizable case or controversy" where, as here, (1) "parties remain adverse," (2) "'valuable legal rights . . . will be directly affected to a specific and substantial degree by the decision of the question of law'" presented in the petition, and (3) the proceedings below "were judicial in nature, and resulted in a final judgment altering tangible legal rights," which was not "an abstract determination" rendered by the State court on "an uncertain or hypothetical state of facts." *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 619 (1989)(citations omitted). This case fully satisfies these requirements for justiciability.[1]

---

[1]The petitioner also must have "standing to invoke the authority of this Court," *ASARCO*, 490 U.S. at 619, which Teresa B. has not challenged. Here, as in *ASARCO*, the petitioner has standing because the state court proceedings ended in "an adjudication of legal rights" which is "the kind of injury cognizable in this Court on review from the state courts;" the petitioner contends the decision below "rests on an erroneous interpretation" of federal law; and this Court's "reversal of the decision below would remove its disabling effects" upon the petitioner. *Id.* at 618-19.

First, the parties to the proceeding below "remain adverse," *id.* at 619, as evidenced by the State's petition and the Brief in Opposition filed on behalf of Teresa B. seeking to prevent this Court from granting review that might invalidate the favorable judgment she obtained below. *See Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 125 S. Ct. 1517, 1526 n.7 (2005)(controversy "remains live" where a party "continues to oppose" the judgment of the State's highest court and "will petition this Court for a writ of certiorari").

Second, as in *ASARCO*, the decision of the Maryland high court interpreting federal constitutional law imposes upon the State of Maryland "a defined and specific legal obligation," *id.* at 618, which "is in effect a declaratory judgment," *Richardson v. Ramirez*, 418 U.S. 24, 35 (1971), preventing the State's social services agencies and its juvenile courts from compelling a parent to disclose the location of a missing child who is under the protective jurisdiction of the juvenile court. "By reason of the special relationship of the public officials in a State to the court of last resort of that State," the decision below, "if left standing, leaves them permanently bound by its conclusion on a matter of federal constitutional law." *Id.* These "valuable legal rights" will be "directly affected to a specific and substantial degree" by the decision of this Court.

Finally, the decision below is unquestionably a "final judgment altering tangible legal rights," which arises from proceedings that were "judicial in nature." *ASARCO*, 490 U.S. at 619. The Maryland Court of Appeals rendered its decision based on a set of concrete facts pertaining to respondent Teresa B., which arose from the specific context of Child in Need of Assistance proceedings instituted for the protection of her child, Ariel G. Thus, as

in *ASARCO*, the State court judgment to be reviewed here is by no means "an abstract determination" or "an advisory opinion rendered through specific mechanisms for obtaining a hypothetical ruling. . . ." *Id.*

The Court of Appeals did not purport to issue an advisory opinion, but instead decided the specific controversy placed before it based on its determination that the case remained justiciable under applicable Maryland law, even though Teresa B. had already been "released from the imprisonment brought about by the contempt." (App. 4a, n.4.) Furthermore, the applicable precedent on which the Court of Appeals relied, *see* App. 4a n.4 (citing *Droney v. Droney*, 102 Md. App. 672, 681-82, 651 A.2d 415, 419-20 (1995)), rejects the proposition that such an appeal is moot and, therefore, directly refutes Teresa B.'s suggestion that the lower court proceeded to decide this case interpreting federal constitutional law "despite its mootness," Br. in Opp. at 11. As *Droney* expressly held, an appeal from a contempt order that is no longer in effect remains viable, the party held in contempt "remains entitled to seek exoneration," and "the issues pertaining to the contempt itself . . . are not moot." *Id.*, 102 Md. App. at 682, 651 A.2d at 419-20.

Therefore, the petition here meets all of this Court's requirements for a justiciable case or controversy.

**2. The Controversy Is Capable Of Repetition, Yet Evading Review.**

While satisfaction of the criteria set forth in *ASARCO* will suffice to support this Court's jurisdiction, respondent's suggestion of mootness should also be rejected because the conduct that gives rise to this case is, regrettably, "capable of repetition, yet evading review,"

and, therefore, the case is not moot. *See Honig v. Doe*, 484 U.S. 305, 318 (1988).

As the record shows, the child Ariel G. suffers from a chronic medical condition, severe asthma, that went without proper treatment when he was under the care of his mother, Teresa B. (App. 2a.) Placed under the protective jurisdiction of the juvenile court, Ariel G. twice disappeared from foster care. (App. 2a-4a.) He was missing for three and a half years, from the fall of 1996 through March 2000 (App. 2a), and was again missing for more than a year and a half, from January 2001 until the fall of 2002. (App. 3a-4a). In each of these instances, the juvenile court questioned Teresa B. in an effort to find her missing child, but she refused to disclose the child's location and invoked the Fifth Amendment privilege against self-incrimination. (App. 2a, 3a.) Given the chronic nature of Ariel G.'s medical condition, the history of repeated and prolonged disappearances from foster care, and Teresa B.'s persistent refusal to disclose his location, there is at least a "reasonable expectation" that this controversy will recur. *Honig v. Doe*, 484 U.S. at 318 n.6. It can also be expected to evade review, as evidenced by the fact that only one of the multiple contempt orders directed at Teresa B. over the long course of these proceedings was ever subjected to appellate review (App. 4a, 4a n.5, 28a.), and as she now argues, even that order should escape this Court's review. For these additional reasons, this case is not moot.

### 3. Important Interests Counsel Against A Determination Of Mootness In This Case.

Especially in light of this case's impact on the ability of the State to provide critical State services for the

protection of children, significant interests recognized by this Court "militate against a conclusion of mootness in this case." *Richardson v. Ramirez*, 418 U.S. at 36. First, under the Supremacy Clause and 28 U.S.C. § 1257, a "predominant interest" is "to assure that the binding application of federal law is uniform and ultimately subject to control by this Court," in part by "assuring 'that state courts will not be the final arbiters of important issues under the federal constitution.'" *ASARCO*, 490 U.S. at 621 (quoting *Minnesota v. National Tea Co.*, 309 U.S. 551, 557 (1940)). That interest would be thwarted by a finding of mootness here, which would permit Maryland's court of last resort, "'quite contrary to the intention of Congress in enacting 28 U.S.C. § 1257,'" to decide a federal constitutional question "'without any possibility of state officials who were adversely affected by the decision seeking review in this Court.'" *ASARCO*, 490 U.S. at 622 (quoting *Richardson v. Ramirez*, 418 U.S. at 42 n.13).

Here, this interest weighs all the more heavily against mootness and in favor of review, because the pending petition represents the State's last opportunity to seek relief from the Maryland court's declaration of federal constitutional law, which imposes an ongoing restraint upon the State's ability to find and protect missing children who are at risk. *See* Petition at 11-12. As this Court has recognized, this situation places the State in a bind that presents even "stronger arguments for concluding that a live case or controversy remains" than might be true in other cases. *Richardson v. Ramirez*, 418 U.S. at 35. That is, without further review by this Court, "in view of the [Maryland Court of Appeals'] decision against the state officials and their obligation to follow the law as laid down by that court," *id.*, the federal constitutional issue raised in the petition would effectively become "'*incapable* of

repetition,' and therefore evading review," *id.* (emphasis added).

Finally, rejecting Teresa B.'s mootness argument also serves this Court's expressed "interest in preventing litigants from attempting to manipulate the Court's jurisdiction to insulate a favorable decision from review," which "counsels against a finding of mootness here." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287 (1997). Ordinarily, a party asserting that a controversy has become moot since the rendering of a judgment below "bears the burden of coming forward with the *subsequent* events that have produced that alleged result." *Cardinal Chemical Co. v. Morton International, Inc.*, 508 U.S. 83, 98 (1993)(emphasis added). In this case, none of the events cited by Teresa B. to show mootness occurred *subsequent* to the favorable decision she won below in the State court. Instead, her mootness argument is based on two *prior* events, which Teresa B. characterizes as "BCDSS's abandonment of its efforts at compulsion" once the missing child was found, and "the concomitant release of Ms. B." Br. in Opp. at 14. Each of those events occurred well before the Court of Appeals issued its decision. (App. 4a, 4a n.4.) Yet, in the State court proceedings, neither Teresa B. nor any other party asserted that the case was moot. This Court should reject Teresa B.'s effort to prevent further review, which is based on the same state of facts that existed when she prevailed in the court below.

**B. Respondent's Other Arguments Do Not Warrant Denial Of Review.**

Teresa B.'s other arguments in opposition to the petition should also be rejected as insufficient bases for denying review.

Respondent's second argument, that "the Court of

Appeals was correct," Br. in Opp. at 15, is merely a repetition of her argument on the merits, which prevailed in the court below. That argument repeats the Court of Appeals' misreading of this Court's decision in *Baltimore City Dept. of Social Services v. Bouknight*, 493 U.S. 549 (1990), which is addressed in the petition at pages 7-10 and 12-16. Otherwise, Teresa B. relies entirely on decisions arising from criminal prosecutions that did not involve civil proceedings for the protection of children. Thus, at most, her argument merely demonstrates that there is disagreement about the meaning and proper application of this Court's precedents, which should be clarified by further review in this case.

Teresa B.'s third argument, that there is "no conflict of authority," Br. in Opp. at 27, simply fails to acknowledge the conflicting result reached in a reported decision by Massachusetts' court of last resort. Unlike the Maryland court below, the Massachusetts court affirmed multiple contempt orders compelling a parent to disclose a missing child's location, notwithstanding the parent's assertion of the Fifth Amendment privilege against self-incrimination. *See In the Matter of a Care and Protection Summons*, 770 N.E.2d 456, 467, 467 n.24 (2002). *See* Petition at 22-23, 23 n.14.

In any event, in this case involving "an important question of federal law" that "has not been, but should be, settled by this Court," which has been decided by the court below "in a way that conflicts with" this Court's precedent, Sup. Ct. R. 10(c), the need for further review should not turn upon either party's parsing of the Massachusetts decision. As explained in the brief filed by *amici curiae* Alabama and twenty other States in support of this petition, "where, as here, (i) the [Maryland] high court seems so convinced of its reading of *Bouknight*, and (ii) 21 States

are equally convinced that the court has fundamentally misunderstood *Bouknight*, the scope of this Court's decision is in need of clarification." Br. of *Amici Curiae* States of Alabama, *et al.* at 6.

For these reasons, Teresa B.'s arguments should not be permitted to deny review of the important federal constitutional question presented by this case.

Finally, though it is not raised as a distinct argument against review, the Brief in Opposition also suggests for the first time, and without citation to any authority, that "unlike production of the child by the custodian, compelled oral testimony is not . . . even authorized" by Maryland's "legislative scheme." Br. in Opp. at 26. That argument, which was neither raised below nor addressed by the Court of Appeals, is incorrect as a matter of law.

The pertinent provision in Maryland's statutory scheme for the protection of Children in Need of Assistance (CINA) authorizes the juvenile court to "issue an appropriate order directing, restraining, or otherwise controlling the conduct of a person who is properly before the court, if the court finds that the conduct: (1) [i]s or may be detrimental or harmful to a child over whom the court has jurisdiction," or "(2) [w]ill tend to defeat the execution of an order or disposition made or to be made" in a CINA proceeding. Md. Code Ann., Cts. & Jud. Proc. § 3-821(a)(1) and (a)(2). (App. 75a.) Such an order is enforceable through the court's contempt powers. *Id.*, § 3-821(c). (App. 75a.) Nothing in the statute purports to prevent a juvenile court from exercising its authority to compel a parent to cooperate in the search for a missing child who is under the court's protective jurisdiction, whether by producing the child or by disclosing the child's last known location.

Therefore, Teresa B.'s objections to further review are without merit.

## CONCLUSION

For the reasons stated, this Court should reject the arguments of the respondent and issue a writ of certiorari to review the judgment of the Court of Appeals of Maryland. Following review, the judgment should be reversed.

Respectfully submitted,

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On Petition for Writ of Certiorari to the
Court of Appeals of Maryland

## BRIEF OF THE STATES OF ALABAMA, DELAWARE, HAWAII, ILLINOIS, IOWA, INDIANA, KANSAS, MASSACHUSETTS, MISSISSIPPI, MISSOURI, NEVADA, NEW MEXICO, OHIO, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, WEST VIRGINIA, AND WYOMING, AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE IN SUPPORT OF PETITIONER

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## QUESTION PRESENTED

Does the Fifth Amendment privilege against self-incrimination permit the parent of a missing child who has been abused or neglected to defy an order issued by a juvenile court having protective jurisdiction over the child pursuant to the State's regulatory regime for protection of such children by refusing to disclose the child's last known location? *See* Pet. at i.

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THE ASSOCIATED PRESS, Feb. 5, 2005, *available at* http://www.waff.com/Global/story.asp?s=2903984 ..... 3

## INTEREST OF AMICI CURIAE

The 21 States joining in this brief as *amici curiae* have a solemn obligation to ensure the welfare of the children that reside within their respective borders. Fortunately, most children are brought up in safe and nurturing environments by competent and loving parents, thus obviating the need for States to take protective action. Other children, however, are not so lucky. Where a State encounters a neglectful or abusive parent, it has a duty to step in and protect innocent young life.

This case illustrates precisely how an unfit parent can disrupt and endanger the life of her child, and then stymie a State's efforts even to locate the child in order to protect him. Here, a mother who had kidnapped her child from protective state custody invoked the Fifth Amendment to justify her refusal to disclose to state social workers the missing child's whereabouts. Citing this Court's decision in *Baltimore City Department of Social Services v. Bouknight*, 493 U.S. 549 (1990), for support, the Maryland Court of Appeals has now essentially endorsed the mother's stonewalling. The *amici* States respectfully but adamantly disagree with the Maryland court's decision and contend that the Court of Appeals has fundamentally misunderstood *Bouknight* – which, *amici* maintain, actually requires a contrary result here. In any event, the *amici* States submit (i) that there exist equally effective, but less socially harmful, means of enforcing the Fifth Amendment, and (ii) that the protections of the Fifth Amendment are (like other constitutional rights) not absolute and should give way, at least in exigent circumstances, to the States' paramount interest in protecting endangered children.

As this brief will show, the meaning of this Court's decision in *Bouknight* is seriously in doubt. The Court should grant *certiorari* in this case to clarify that decision – and, in so doing, clarify the interplay between a parent's Fifth Amendment rights, on the one hand, and the States'

compelling interest in protecting endangered children, on the other.

## INTRODUCTION

This case arises against a rather startling backdrop. More and more, it seems, children are under attack – from sexual predators, child pornographers, child abusers, and all manner of other evildoers. *See, e.g., McKune v. Lile*, 536 U.S. 24, 32-33 (2002) ("[T]he victims of sexual assault are most often juveniles."); *New York v. Ferber*, 458 U.S. 747 (1982) (recognizing the insidious and deeply damaging effects of child pornography); *Deshaney v. Winnebago Co. Dep't of Social Services*, 489 U.S. 189 (1989) (young boy, "poor Joshua," severely beaten by his own father).

The first line of defense in safeguarding the Nation's children, of course, is the family unit. We rely on (and rightly expect) parents to take care of and protect their minor children. *See Reno v. Flores*, 507 U.S. 292, 318 (1993) (O'Connor, J., concurring) ("[I]n our society, children normally grow up in families, not in governmental institutions."). Most parents, of course, discharge that obligation lovingly and dutifully, if not always perfectly. Unfortunately, however, that is not uniformly the case. Too often – and seemingly increasingly – society confronts parents who have turned on their children by abandoning, neglecting, abusing, or even killing them.

In the month or so since the State of Alabama undertook the drafting of this brief, news accounts of parents abandoning or abusing their children (or much worse) have flashed the following headlines:

- "Police Say Mother Confessed To Starving Her Children To Death"[1];
- "Capital charges in baby's death: Autopsy results indicate baby was born alive and then drowned"[2];
- "Couple accused of torturing children: Allegedly pulled out kids' toenails, beat them with hammers"[3];
- "Police: Girl locked in room for over a year"[4];
- "Coroner: Girl was Tortured: 4-year-old's injuries 'beyond child abuse'"[5]; and
- "Father charged in death of baby"[6]

These are not stories that we went digging for. Regrettably, we didn't have to; they couldn't be missed. The prevalence of such stories – depicting the often-terrible things that parents do to their own children –

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[1] THE ASSOCIATED PRESS, Feb. 5, 2005, *available at* http://www.waff.com/Global/story.asp?s=2903984.

[2] Ryan Dezember, MOBILE REGISTER, Feb. 12, 2005, *available at* http://www.al.com/news/mobileregister/index.ssf?/base/news/11 08203605260910.xml.

[3] THE ASSOCIATED PRESS, Feb. 4, 2005, *available at* http://www. cnn.com/ 2005/US/02/03/family.torture/.

[4] THE ASSOCIATED PRESS, Feb. 10, 2005, *available at* http://www .cnn.com/2005/US/02/10/girl.abuse.ap/.

[5] Carol Robinson and Chanda Temple, THE BIRMINGHAM NEWS, Feb. 23, 2005, *available at* http://www.al.com/news/birmingham news /index.ssf?/base/news/110915435742241.xml.

[6] Connie Baggett, MOBILE REGISTER, Feb. 22, 2005, *available at* http://www.al.com/news/mobileregister/index.ssf?/base/news/11 09067593279570.xml.

serves, if nothing else, to underscore the real-world importance of this case.

## STATEMENT OF FACTS

In 1996, the Baltimore City Department of Social Services ("BCDSS") took 5-year-old Ariel into custody to protect him from his mother, Teresa B. Pet. App. 1a. Based on Teresa B.'s failure to provide treatment for her son's severe medical condition, BCDSS filed a petition deeming Ariel a "Child in Need of Assistance." Pet. App. 2a. After the juvenile court placed Ariel in protective custody with BCDSS, but before an adjudicatory hearing could be held, Teresa B. kidnapped Ariel and absconded. *Id.* Teresa B. eluded Maryland child welfare authorities for more than three years until, finally, she was caught in 2000. *Id.* Despite Teresa B.'s refusal to disclose Ariel's whereabouts, BCDSS managed to locate him; the agency again placed him in protective custody and, thereafter, in foster care. *Id.* In January 2001, however, Ariel's foster parents discovered that he was missing (again). *Id.* Teresa B. could not be located either, and in the Court of Appeals' words, "it was widely speculated that Teresa again had fled with Ariel." *Id.*

When, later in 2001, Teresa B. was apprehended alone, she again refused to disclose Ariel's location. *Id.* The juvenile court judge pointedly questioned her as to Ariel's whereabouts; Teresa B., however, invoked the Fifth Amendment and refused to answer the court's queries. *Id.* The court found Teresa B. in contempt and ordered her jailed. In the ensuing months, Teresa B. was brought before the court numerous times, and on each occasion was given the opportunity to purge the contempt. Each time, she refused, citing the Fifth Amendment. *Id.*

In June 2002, the juvenile court judge gave Teresa B. yet another opportunity to disclose Ariel's whereabouts. This time, she responded that, because she had been incarcerated during the preceding ten months, she did not know her son's present location. *Id.* The judge then

asked Teresa B., in the alternative, at least to provide Ariel's last known location. She again refused to respond, invoking the Fifth Amendment. Pet. App. 3a-4a. Teresa B. issued a similar refusal at a hearing in September 2002. Pet. App. 4a. Despite Teresa B.'s recalcitrance, BCDSS was finally able to locate Ariel, whom they placed with relatives. *Id.*

## REASONS FOR GRANTING THE WRIT

Just as it is true that, in the normal course, children "grow up in families, not in governmental institutions," Justice O'Connor has observed that the "government's failure to take custody of a child whose family is unable to care for her may also effect harm." *Reno v. Flores*, 507 U.S. 292, 318 (1993) (O'Connor, J., concurring). The question presented here is whether the very person from whom a State is seeking to protect a neglected child may unilaterally thwart the State's efforts to prevent the very "harm" to which Justice O'Connor alluded. Specifically, the question is whether a mother who has at least once (and probably twice) kidnapped her 5-year-old son from protective state custody may invoke the Fifth Amendment in refusing to tell child-welfare personnel the child's last known location. That question, as we hope we have shown, is not merely an academic one.

### I. The Meaning Of This Court's Decision In *Bouknight* Is Seriously In Doubt And Requires Clarification.

In *Baltimore City Department of Social Services v. Bouknight*, 493 U.S. 549 (1990), this Court held that the parent of an abused or neglected child may not invoke the Fifth Amendment as a basis for refusing a court's order to produce the missing child. In this case, the Court is asked to answer a question left open by *Bouknight* – specifically, whether the parent may refuse on Fifth Amendment grounds to disclose to a juvenile court judge (as an alternative to production) the child's last known location.

Initially, therefore, there is the question whether this case fits within the rationale – if not the square holding – of this Court's decision in *Bouknight*. The Maryland Court of Appeals concluded, unanimously, that it does not. Indeed, that court found *Bouknight*'s reasoning to be positively "inapplicable" to the facts presented here. Pet. App. 9a; *id.* at 10a ("not applicable"). It offered two reasons for so concluding. As we will show, neither withstands scrutiny. Clearly, where, as here, (i) the state high court seems so convinced of its reading of *Bouknight*, and (ii) 21 States are equally convinced that that court has fundamentally misunderstood *Bouknight*, the scope of this Court's decision is in need of clarification.

### A. For Fifth Amendment Purposes, There Is No Meaningful Distinction Between Production Of A Child And Disclosure Of The Child's Whereabouts.

As its first basis for refusing to follow *Bouknight*'s lead, the Maryland court drew a bright-line distinction between the act of producing a child, on the one hand, and the act of communicating the child's whereabouts, on the other. Characterizing (but not quoting) the decision in *Bouknight*, the Court of Appeals found that this Court had held that "[p]roducing [a] child pursuant to a court order ... was not a sufficiently testimonial communication and therefore fell outside the boundaries of the Fifth Amendment's protections." Pet. App. 10a. The Maryland court later reiterated its understanding that *Bouknight* had held that the "act of producing [a] child was not a testimonial communication, but rather an act of production that fell outside the Fifth Amendment's protection." Pet. App. 11a.

With respect, that is not at all what this Court said in *Bouknight*. To the contrary, all nine Justices – majority and dissenters alike – agreed that *Bouknight* was decided on the express assumption that the act of producing a child pursuant to a court order ***is*** a "testimonial" act for

Fifth Amendment purposes. For those in the majority, Justice O'Connor wrote as follows:

> The possibility that a production order will compel testimonial assertions that may prove incriminating does not, in all contexts, justify invoking the privilege to resist production. *Even assuming that this limited testimonial assertion is sufficiently incriminating and "sufficiently testimonial for purposes of the privilege,"* Bouknight may not invoke the privilege to resist the production order because she has assumed custodial duties related to production and because production is required as part of a noncriminal regulatory regime.

493 U.S. at 555-56 (internal citations omitted) (emphasis added). Justice Marshall, writing for himself and Justice Brennan in dissent, likewise emphasized that the Court had "correctly assume[d]" – not just assumed, but *correctly* assumed – "that Bouknight's production of her son to the Maryland court *would be testimonial* because it would amount to an admission of Bouknight's physical control over her son." *Id.* at 563 (Marshall, J., dissenting) (emphasis added). In the face of this Court's very clear acknowledgements that it was deciding *Bouknight* on the premise that "testimony" (in the Fifth Amendment sense) was at stake, the Court of Appeals' contrary characterization is puzzling. (Notably, the Court of Appeals' characterization of *Bouknight* is supported not by any language in this Court's written opinions but, instead, only by a very generic pinpoint citation to pages 554-59 of the decision. *See* Pet. App. 10a, 11a.)

So, what this Court actually said in *Bouknight* was (i) that a parent's act of producing her child *is* a sufficiently "testimonial" act to trigger the Fifth Amendment's coverage – *but* (ii) that, in the circumstances presented, the Fifth Amendment posed no bar to the compulsion of that testimonial act. And the reason that there was no Fifth Amendment bar, this Court held, was because (i)

the protection of abused, neglected, and missing children is a valid "noncriminal, regulatory" objective, and (ii) "the Fifth Amendment privilege may not be invoked to resist compliance with a regulatory regime constructed to effect the State's public purposes unrelated to the enforcement of its criminal laws." 493 U.S. at 556. Thus, the Court concluded, "the ability to invoke the privilege may be greatly diminished when invocation would interfere with the effective operation of a generally applicable, civil regulatory requirement" like child protection. *Id.* at 557; *accord id.* at 558 ("When a person assumes control over items that are the legitimate object of the government's noncriminal regulatory powers, the ability to invoke the privilege is greatly reduced.").

This Court "readily" concluded that those principles "appl[ied] to th[e] case" before it. *Id.* at 559. Specifically, the Court held that once Maurice – the missing child in *Bouknight* – "was adjudicated a child in need of assistance" by the State, "his care and safety became the particular object of the State's regulatory interests." *Id.* To say that the *Bouknight* Court's recognition of the State's valid civil-regulatory interest in the welfare of abused and neglected children maps directly onto this case would be an understatement. *Bouknight* involved the very same state agency – the Baltimore City Department of Social Services – that has intervened here to protect Ariel's well-being. Of course, that agency operates today pursuant to the same laws that this Court cited in *Bouknight* as evidence of the State's valid civil-regulatory interests. *See id.* (citing Md. Cts. & Jud. Proc. Code. Ann. §§ 3-801(e), 3-804(a) (Supp. 1989)). So when, in support of its conclusion that Marlyand's protection of missing children served a valid non-criminal purpose, the *Bouknight* Court quoted a Maryland state court's observation that it had "jurisdiction to require at all times to know the whereabouts of the minor child," *id.*, it goes without saying that the observation applies equally here.

Far from being "inapplicable" here (Pet. App. 9a), *Bouknight*'s reasoning seems to be very nearly on point.

### B. Teresa B. Should Not Be Rewarded For Her Decision To Kidnap And Abscond With Ariel, Rather Than To Submit To The Jurisdiction Of The State Courts.

The Maryland court offered a second basis for distinguishing *Bouknight*: Whereas the mother in that case "had consented to the conditions placed upon her" by the state child-protection agency, Teresa B. – the mother here – has not. Pet. App. 10a. Teresa B., the Court of Appeals noted, "did not consent to the court's or BCDSS's jurisdiction over Ariel and never agreed to any terms that would allow her to retain any degree of lawful custody over Ariel." Pet. App. 12a. Thus, the court said, "Teresa, unlike Bouknight, may not be said to have submitted to the regulatory regime of the BCDSS." *Id.*

While those may well be accurate statements of fact, it is inconceivable to us why the distinction the Maryland court drew should benefit Teresa B. Rather than submitting to the state agency's supervision, *Teresa B. kidnapped and absconded with Ariel – at least once, and in all probability twice.* As the Court of Appeals itself reported, "[a]fter the [juvenile] court entered an order placing Ariel in protective custody but before an adjudicatory hearing could be held, Teresa absconded with Ariel." Pet. App. 2a. Later, "[a]fter three years of eluding the authorities," Teresa B. was located and arrested. *Id.* Although Teresa B. refused (then, as later) to disclose Ariel's whereabouts, the State managed to find him, and once again placed him in protective custody and ultimately in foster care. There he stayed until, one morning, Ariel's foster parents "discovered that [he] was missing from his bedroom." *Id.* "Attempts to locate his mother were unsuccessful, and it was widely speculated that Teresa again had fled with Ariel." *Id.*

The Maryland court's distinction of *Bouknight* sets the world on its head: The parent (Bouknight) who at least partially cooperates with the State by consenting to its supervision *does not* get Fifth Amendment protection,

while the parent (Teresa B.) who thumbs her nose at child-welfare personnel – going so far as to kidnap her own child – *does* get that protection. The Court of Appeals' reasoning creates the most perverse incentive imaginable for abusive parents (namely, kidnap and stonewall), and, with respect, cannot possibly be a valid inference from *Bouknight*. Surely, just the opposite is true. If the State's valid civil-regulatory interest in protecting abused and neglected children was sufficient to override Bouknight's Fifth Amendment privilege, then it must also be sufficient to supersede the interests of Teresa B., who has, if anything, proven herself less trustworthy, less cooperative, and less interested in her child's well-being.

## II. The Court Of Appeals' Additional Justifications For Its Decision Do Not Withstand Scrutiny.

Aside from its efforts to finesse *Bouknight*, the Court of Appeals offered two additional bases for its decision. Neither is persuasive.

### A. To The Extent There Exists A Concern About The State Using Parents' Statements For Law-Enforcement Purposes, Suppression, Not Court-Sanctioned Stonewalling, Is The Appropriate Remedy.

Although it expressly acknowledged that "the juvenile court's primary objective was to determine Ariel's location for his safety" – the very civil-regulatory interest validated in *Bouknight* – the Court of Appeals emphasized, as a basis for applying the Fifth Amentment, that "[i]t was clear that his mother's statements not only could be used to locate the child, but also to gather evidence for law enforcement purposes as to how Ariel left the foster home" and "to discover what role Teresa may have had in Ariel's disappearance." Pet. App. 8a. There are two problems with the court's reasoning.

First, that was Justice Marshall's view in *Bouknight*, and, with respect, that view was decisively rejected.

Indeed, the Court of Appeals' reliance on what it perceived to be the "real" purpose underlying the juvenile court's order to disclose the Ariel's last known location follows straightaway from the following passage of Justice Marshall's dissenting opinion: "Virtually any civil regulatory scheme could be characterized as essentially noncriminal by looking narrowly or, as in this case, *solely* to the avowed non-criminal purpose of the regulations. If one focuses instead on the practical effects, the same scheme could be seen as facilitating criminal investigations." 493 U.S. at 568 (Marshall, J., dissenting). But writing for a seven-member majority and, notably, citing the same Maryland statutes at issue here, Justice O'Connor expressly took a different view, one that applies equally here:

> Similarly, BCDSS' efforts to gain access to children, as well as judicial efforts to the same effect, do not "focu[s] almost exclusively on conduct which was criminal." [*California v.*] *Byers*, 402 U.S. [424,] 454, 91 S.Ct. [1535,] 1551 (1971) (Harlan, J., concurring in judgment). Many orders will arise in circumstances entirely devoid of criminal conduct. Even when criminal conduct may exist, the court may properly request production and return of the child, and enforce that request through exercise of the contempt power, for reasons related entirely to the child's well-being and through measures unrelated to criminal law enforcement or investigation. See Maryland Cts. & Jud.Proc.Code Ann. § 3-814(c) (1984). *This case provides an illustration: concern for the child's safety underlay the efforts to gain access to and then compel production of Maurice.*

493 U.S. at 560-61 (emphasis added). Plainly, the Court of Appeals' emphasis here on what it perceived to be a prosecutorial motive lurking beneath the surface of the juvenile court's disclosure order cannot be squared with *Bouknight*.

Second, and in any event, if, as the Court of Appeals' opinion indicates, there is a concern with the State's use of parents' testimony for "law enforcement" or prosecutorial purposes (Pet. App. 8a), there is a readily available means – short of court-sanctioned stonewalling – of vindicating that concern. Indeed, it is a means to which this Court adverted in *Bouknight* and that the State of Maryland candidly acknowledges here (Pet. at 16). In *Bouknight*, this Court excused itself from "defin[ing] the precise limitations that may exist upon the State's ability to use the testimonial aspects of [a parent's] act of production in subsequent criminal proceedings," but emphasized that the "imposition of such limitations [was] not foreclosed." 493 U.S. at 561. The Court observed that a State's valid civil-regulatory requirement "in the usual case may neither compel incriminating testimony nor aid a criminal prosecution, but the Fifth Amendment's protections are not thereby necessarily unavailable to the person who complies with the regulatory requirement after invoking the privilege and subsequently faces prosecution." *Id.* at 561-62.[7]

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[7] Notably, the Court of Appeals seems to have misconstrued this passage of *Bouknight*, and then used its misconstruction to support a rule absolutely prohibiting a State from requiring a parent to disclose a missing child's whereabouts. In support of its view (which we have already critiqued at some length, *see supra* at 6-9), that *Bouknight* would have come out the other way had the issue there been testimony (in the traditional sense) rather than production, the Court of Appeals recited part of the above-quoted passage – that a State's noncriminal regulatory requirement "may neither compel incriminating testimony nor aid a criminal prosecution." Pet. App. 14a-15a. By truncating the full sentence, the Court of Appeals made it seem as if this Court had used the word "may" in its mandatory sense to mean "must." In context, however – given that what follows is the statement, "but the Fifth Amendment's protections are not therefore necessarily unavailable ...." – it seems clear enough that, in fact, this Court was using the word "may" in its conditional sense to mean "might." The Court of Appeals' misunderstanding of this aspect of *Bouknight* further undermines its distinction of that case – and further underscores the need for clarification from this Court.

The sensible solution, therefore, to any concern about requiring parents like Teresa B. to "participate in their own criminal prosecutions," *id.* at 570 (Marshall, J., dissenting), is to permit those parents to seek suppression of their statements in the event a prosecution is eventually brought. That solution serves *both* the State's overriding (and immediate) interest in locating the missing child *and* the parent's interest in not being "compelled in any criminal case to be a witness against himself," U.S. Const. amend. V, and is surely preferable to the Court of Appeals' wooden approach, which completely sacrifices the former to the latter. *Cf. Chavez v. Martinez*, 538 U.S. 760, 766-70 (2003) (noting that the "core" of the Fifth Amendment's Self Incrimination Clause is the privilege against the *use in a criminal trial* of a compelled statement); *id.* at 777 (Souter, J., concurring in the judgment) (same).

It bears emphasis in closing that, at least in the child-protection situation, this "suppression" solution is manifestly superior to the "immunity" solution suggested by the Court of Appeals (Pet. App. 17a-18a). As Maryland's petition for certiorari makes clear (Pet. at 17), child-welfare agencies – whose mission is to protect abused and neglected children, not to prosecute criminals – oftentimes will not be authorized to grant immunity from criminal prosecution. Because time is of the essence when the task is securing the welfare of a missing child, the Court should be slow to adopt any rule that would require a social worker to track down and contact the local DA, and then convince her of the merits of a grant of immunity – all before acquiring information that he needs immediately.

### B. The Fifth Amendment's Protections Are Not Absolute And Must Give Way In Exigent Circumstances To The States' Compelling Interest In Protecting Endangered Children.

For the proposition that the State's "extremely important" interest in protecting vulnerable children does

not "justify abandonment of our constitutional foundations," the Court of Appeals pointed to what it took to be the "unequivocal" and "exception[less]" language of the Fifth Amendment. Pet. App. 16a. The court's analysis in this respect is misguided in several respects. First, all constitutional rights are subject – if only in rare circumstances – to competing considerations. The First Amendment, which has enjoyed something of a privileged position among constitutional provisions,[8] no less than the Fifth, is phrased in "unequivocal" terms: "Congress shall make no law ...." U.S. Const. amend. I. Nonetheless, "[t]his Court has frequently denied that First Amendment rights are absolute ...." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 570 (1976); *see also Virginia v. Black*, 538 U.S. 343, 358 (2003) ("The protections afforded by the First Amendment, however, are not absolute ...."). Even, for instance, in the particularly sensitive area of political speech, this Court has held that the First Amendment must sometimes yield to compelling state interests. *See, e.g., McConnell v. FEC*, 540 U.S. 93 (2003). So, too, in the free-exercise context, individual rights often give way to generally applicable state laws. *See Employment Div., Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). There is no need to multiply examples to show, as a baseline, that the Court of Appeals' reliance on the Fifth Amendment's seemingly exceptionless language rests on oversimplification.

The second problem with the Court of Appeals' analysis is related. The State's interest in safeguarding the welfare of children (who are among its most vulnerable citizens) is not just "important," as the Maryland court said. On the contrary, this Court has repeatedly affirmed, in various contexts, that the

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[8] *See e.g., Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 264-65 (1986) (quoting Justice Cardozo's majority opinion in *Palko v. Connecticut*, 302 U.S. 319, 327 (1937), to reiterate that "freedom of thought and speech 'is the matrix, the indispensable condition, of nearly every other form of freedom'").

protection of children is indeed a "compelling" state interest. *See Denver Area Educational Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 747 (1996); *Maryland v. Craig*, 497 U.S. 836, 853 (1990); Pet. at 13-14 (collecting cases). That fact is important, of course, because under this Court's doctrine, fundamental constitutional rights may be compromised only – as we said earlier, in rare circumstances – where there is a showing that "'the infringement is narrowly tailored to serve a *compelling* state interest.'" *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (quoting *Flores*, 507 U.S. at 302) (emphasis added). Protecting the welfare of innocent children, this Court has made plain, is just such an interest.

Which leads to the third problem with the Court of Appeals' statement of Fifth Amendment absolutism. The rule that the States seek here is indeed "narrowly tailored." It would not, as the Maryland court seemed to believe, work an "abandonment of our constitutional foundations." App. 16a. Not in the least. Neither Maryland nor the *amici* States are asking for a free pass. Rather, the minor accommodation sought here – if it can even be called that – is limited in two important respects. First, it would not apply in all (or even most) situations in which an individual seeks to refuse requests for information. Rather, it would apply only in situations, like the one here, that present something akin to "exigent circumstances" (as that term has come to be used in the related Fourth Amendment context). *See, e.g., United States v. Wilson*, 306 F.3d 231, 238-39 (5th Cir. 2002) (possible danger to children cited as an "exigent circumstance" justifying a warrantless search by police); *White v. Pierce County*, 797 F.2d 812, 815-16 (9th Cir. 1986) (finding that the likely abuse of a child was an "exigent circumstance" that justified taking the child into protective custody without a court order). And second, as noted above (*see supra* at 12-13), the requirement that a parent who is unwilling to produce a child under state care disclose the child's last known location could be

tempered, when the situation arose, by a rule allowing the parent to seek suppression in a subsequent criminal prosecution.

## CONCLUSION

For the foregoing reasons, the *amici* States submit that the Court should grant writ of *certiorari*.

Respectfully submitted,

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